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VOL. 98 (2d Series) February 1985 No. 2

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FEDERAL COMMUNICATIONS COMMISSION REPORTS
(98 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 98 (2d Series)
Pages 427 to 853

Reported by the Commission

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INDEX

Page

Amendment of Part 0; re Confidential material, Gen. Docket No. 83-975, (FCC 84-217) 1

Amendment of Part 21; re *Further Notice of Proposed Rulemaking & Notice of Inquiry* adopted, Gen. Docket No. 80-113, (FCC 84-176) 7

Amendment of Part 73: re Elimination of premium signal coverage requirements, MM Docket 83-15, (FCC 84-243) 25

Amendment of Part 74; re Petition for Rule for Rule Making denied, Docket No. 19918, CC 84-158 (FCC 84-158) 35

Amendment of Part 90; re Petitions for reconsideration and rulemaking granted to an extent, Docket No. 20846, (FCC 84-170) 46

Amendment of Part 90; re *Notice of Proposed Rule Making* adopted. PR Docket No. 84-414, (FCC 84-171) 59

Amendment of Parts 21, 74 and 94; re *First Report and Order* adopted, Gen. Docket No. 80-113, (FCC 84-175) 68

Amendment of Parts 2, 21, 74, and 94; re Reconsideration of *Report and Order*, 94 FCC 2d 1203 (1983) denied, Gen. Docket No. 80-112, (FCC 84-177) . 129

Amendment of Part 76; re *Report and Order* adopted, Section 76.12, MM Docket No. 83-1292, (FCC 84-274) 427

Amendment of Parts 2 and 73; re Motions for stay of FM subcarrier Order, 49 FR 19659, denied, BC Docket No. 82-536, (FCC 84-313) 433

AT&T Co.; re Commission reconsidered & amended some conditions on grant under Sections 214 & 310(d), (FCC 84-288) 141

AT&T Co.; re Application granted to construct and operate transatlantic cable, Section 214, TAT-8, (FCC 84-240) 440

AT&T Co.; re Provision of basic services via resale by separate subsidiary, CC Docket No. 83-1375, (FCC 84-289) 478

Authorized User Policy; re *Further Notice of Proposed Rulemaking* adopted, CC Docket No. 80-170, (FCC 84-151) 158

Bendel B/cing Corp.; re Commission remanded proceeding to Administrative Law Judge, BC Docket No. 80-97, (FCC 84-213) 164

Page

California B/cing Corp.; Review Board dismissed appeal of non-party, BC Docket No. 80-698, (FCC 84R-38) 502

Cellular Lottery Rulemaking; re Rules established to implement lottery for cellular service, CC Docket No. 83-1096. (FCC 84-150) 175

Cellular Mobile Systems of Tampa; re Application for review and petition for reconsideration denied, CC Docket No. 83-823, (FCC 84-149) 231

C&P Telephone Co. of Virginia; re Applications for authorization to construct and operate limited networks granted, (FCC 84-178) 238

Central Pacific B/cing Corp.; re Review Board denied interlocutory appeal, MM Docket No. 83-785, (FCC 83R-92) 504

Central Pacific B/cing Corp.; re Applications for constuction permit, MM Docket No. 83-785, (FCC 83D-62) 507

Clay Television, Inc.; re Petition for reconsideration denied, BC Docket No. 81-690, (FCC 84R-25) 510

Colorado Television, Inc.; re Review Board affirmed grant of construction permit, BC Docket No. 80-466, (FCC 84R-53) 513

Colorado Television, Inc.; re Applications for construction permit, BC Docket No. 80-466, (FCC 83D-45) 527

COMSAT; re Authority granted to participate in INMARSAT's satellite program, (FCC 84-248) 536

Focus Television Co.; re Review Board assessed comparative character demerit and reversed ALJ's I.D., BC Docket No. 82-259, (FCC 84R-59) 546

Focus Television Co.; re Applications for construction permit for new TV station, BC Docket No. 82-259, (FCC 84D-9) 556

Green Country Mobilephone, Inc.; re Applications for review of staff's action denied, (FCC 84-180) 593

Horne Industries, Inc.; re Application for review granted to an extent and denied in other respects, BC Docket No. 81-551, (FCC 84-286) 601

Integrated Services Digital Networks; re Report addresses comments and U.S. telecommunications policies, Gen. Docket No. 83-841, (FCC 84-131) 249

Intercontinental Radio, Inc.; re Review Board reversed *I.D.* and granted renewal application, Station KSOL(FM), BC Docket No. 81-890, (FCC 84R-52) . 608

Intercontinental Radio, Inc.; re Applications for renewal of license of station KSOL(FM), and for construction permits, BC Docket No. 81-890, (FCC 83D-70) 650

Kaldor Communications, Inc.; re Review Board affirmed ALJ's grant based on Section 307(b), BC Docket No. 82-118, (FCC 84R-26) 292

Kaye-Smith Enterprises; re Petition for reconsideration denied; BC Docket No. 82-265, (FCC 84R-55) 670

Page

Kaye-Smith Enterprises; re Applications for renewal of license of station KISW(FM) and construction permit, BC Docket No. 82-265, (FCC 84R-42)..... 675

Kaye-Smith Enterprises; re Applications for renewal of license of station KISW(FM) and construction permit, BC Docket No. 82-265, (FCC 83D-65)..... 688

Metromedia, Inc.; re Applications for consent to transfer of corporate control granted, (FCC 84-138)..... 300

Miller Broadcasting, Inc.; re Review Board overturned ALJ's interlocutory ruling, BC Docket No. 82-807, (FCC 84R-51)..... 725

Monterey Peninsula TV Cable; re Petition for declaratory ruling denied, (FCC 84-205)..... 310

Motek Engineering; re *Memorandum Opinion and Order* adopted, (FCC 84-196)..... 323

MTS/WATS Market Structure; re *Order Granting Waiver* until June 1, 1985, adopted, CC Docket No. 78-72, (Phase I), (FCC 84-204)..... 327

MTS/WATS Market Structure; re Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, (FCC 84-106)..... 730

Mutual Radio of Chicago, Inc.; re Application for the voluntary assignment of license of AM station WCFL, Chicago, Ill. (FCC 84-203)..... 330

Public B/cing; re Public radio and television stations deregulated, BC Docket No. 81-496, (FCC 84-294)..... 746

Satellite TV Corp.; re Applications for modification of CP granted, (FCC 84-208) 339

Satellite Business Systems; re Petition to modify conditions of authorization granted subject to conditions, ENF-83-16, (FCC 84-197)..... 762

Section 214 Authorization; re *Report and Order* adopted, CC Docket No. 84-28, (FCC 84-198)..... 354

Separations Procedures; re Commission adopted Reconsideration Order, (FCC 84-268)..... 777

Station Identification; re Petition for partial reconsideration of *Report and Order* 95 FCC 2d 1253, denied, BC Docket No. 82-374, (FCC 84-339)..... 787

Subsidiary Communications Authorization; re Petitions for reconsideration of amendment of Parts 2 and 73 granted to an extent, BC Docket No. 82-536, (FCC 84-187)..... 792

Telecommunications Equipment; Second Further Notice of Proposed Rulemaking, CC Docket No. 81-893, (FCC 84-238)..... 361

Telecommunications Equipment; re Order adopted, CC Docket 81-893 (FCC 84-239)..... 376

Telecommunications Equipment; re Detariffing of embedded CPE, CC Docket No. 81-893, (FCC 84-269)..... 814

Telecommunications Equipment; re Adjustments in lease rates applicable to embedded multi-line CPE, (FCC 84-304)..... 838

Page

Walt-West Enterprises Inc.; re License renewal applications granted, (FCC 84-296) 844

Wideband Modulation Systems; re *Further Notice of Inquiry and Notice of Proposed Rule Making* adopted, Gen. Docket No. 81-413, (FCC 84-169)..... 380

World Administrative Radio Conference; re *Fourth Notice of Inquiry* adopted, Gen. Docket No. 80-741, (FCC 84-194)..... 402

Subject Digest

Action Appealable

Review Board dismissed appeal of non-party because Commission's rules provide it no present route of appeal.
—*California B/cing Corp.*
BC Docket No. 80-698

Administrative Law Judge, Authority of

Review Board denied interlocutory appeal wherein applicant, apprehensive that ALJ would add a character issue against it, requested the Board to instruct ALJ to grant its application immediately. Board noted that the request for grant was premature since basic qualifying issues were outstanding.
—*Central Pacific B/cing Corp.*
MM Docket No. 83-785

Amicus Curiae

Application for review granted to an extent and denied in other respects. One hundred percent female applicant preferred over 15% black owned applicant where both applicants were fully integrated. Review Board Decision modified to indicate that Commission will give comparative credit for less than controlling integrated minority ownership. Late filed intervention request denied but trade association formed to represent Black broadcasters permitted to participate as an *amicus curiae.*
—*Horne Industries, Inc.*
BC Docket No. 81-551

Application, Amendment of, Effect of Delay in Filing

Review Board affirmed grant of construction permit in comparative broadcast hearing, based on superior diversification of media control, where applicants have numerous other media interests. Third applicant disqualified because of lack of good cause for late engineering amendment and questioned reasonable assurance of site availability. Moderate demerit assessed on coverage map issue.
—*Colorado Television, Inc.*
BC Docket No. 80-466

Application for Review

Applications for review of staff's action returning as unacceptable for filing of applications to establish cellular systems denied based on administrative efficiency, regularity and fairness.
—*Green Country Mobilephone, Inc.*

Application, Unacceptable
(See: Application for Review-*Green Country Mobilephone, Inc.*)

Attorney As Witness
Review Board overturned ALJ's interlocutory ruling requiring withdrawal of counsel's firm where counsel was to be a witness in proceeding. Board noted the reasons underlying the rule on which removal was based did not appear sufficient to outweigh the benefit of allowing applicant counsel of its choice.
—*Miller Broadcasting, Inc.*
BC Docket No. 82-807

Attorney, Removal From FCC Hearing
(See: Attorney As Witness-*Miller Broadcasting, Inc.*)

CATV Records for Public Inspection
Report and Order adopted terminating proceeding and deleting the requirement for cable television operators to file registration statements pursuant to Section 76.12 of the Commission's Rules when they add a television broadcast station.
—*Amendment of Part 76*
MM Docket No. 83-1292

CATV Registration Procedure
(See: CATV Records for Public Inspection-*Amendment of Part 76*)

CATV Report and Order
(See: CATV Registration Procedure-*Amendment of Part 76*)

Cellular Communications Systems
(See: Application for Review-*Green Country Mobilephone, Inc.*)

Character Qualifications
(See: Administrative Law Judge, Authority of-*Central Pacific B/cing Corp.*)

Review Board assessed substantial and decisive comparative character demerit under a violation of laws issue, reversing the ALJ, and awarded a TV construction permit to the applicant that lacks its opponent's diversification and ownership integration preferences but has no demerits.
—*Focus Television Co.*
BC Docket No. 82-259

Character Qualifications, Nondisclosure

Petition for reconsideration of *Kaye-Smith Enterprises*, FCC 84R-42, released June 8, 1984, denied. Petition to add a Section 1.65 issue also denied.
—*Kaye-Smith Enterprises*
BC Docket No. 82-265

Common Carrier

Commission granted authority to Communications Satellite Corporation to participate in INMARSAT's first generation satellite program to lease satellite capacity in order to provide global maritime telecommunications service.
—*COMSAT*

Commission adopted order providing for removal from regulated service of installed customer premises equipment used in mobile telephone service and owned by American Telephone and Telegraph Company, the independent telephone companies, or the radio common carriers.
—*Telecommunications Equipment*
CC Docket No. 81-893

Commission adopted Order authorizing AT&T Information Systems to carry out lease rate adjustments on July 1, 1984, for embedded multi-line customer premises equipment, and providing that subsequent adjustments for this equipment may be made by AT&T-IS on July 1, 1985, and January 1, 1986.
—*Telecommunications Equipment*
CC Docket No. 81-893

Common Carrier, Authorization

Report and Order adopted regarding proposal to allow AT&T Information Systems to provide basic, resold services.
—*AT&T Co.*
CC Docket No. 83-1375

Petition to modify conditions of authorization granted subject to conditions. Commission removed marketing restrictions imposed on Satellite Business Systems and IBM, one of its parent companies. Reasons for imposing restrictions are no longer applicable given the growth of domestic satellite industry and inability for IBM to impair competition in telecommunications market.
—*Satellite Business Systems*

Common Carrier, Cable Authorization
Commission *Order and Authorization* adopted granting application to construct and operate eighth transatlantic cable (TAT-8) which will provide digital, fiber optic capacity between the United States and both the United Kingdom and France.
—AT&T Co.

Common Carrier, Contract With Another Carrier
Order adopted providing for continuation of status quo on interim intercarrier revenue-division arrangements and interconnections for other Common Carriers during review of exchange access tariffs. Decision to reexamine rates of return for American Telephone and Telegraph Co. and exchange carriers.
—MTS/WATS Market Structure
CC Docket No. 83-1145

Common Carrier, Interconnection
(See: Common Carrier, Contract With Another Carrier-*MTS/WATS Market Structure*)

Common Carrier, Rates, Charges
(See: Common Carrier, Contract With Another Carrier-*MTS/WATS Market Structure*)

Common Carrier, Revenue Requirements
(See: Common Carrier, Contract With Another Carrier-*MTS/WATS Market Structure*)

Comparative Hearing
Review Board reversed *I.D.* and granted renewal application of Station KSOL(FM). No disqualification or demerit assessed for unrelated misconduct of parent United Broadcasting Corp. at distant stations WOOK(AM) and WFAB(FM). Licensee's past performance in most recent (pre-challenge) term was at least "substantial," previous terms were "more than minimal."
—Intercontinental Radio, Inc.
BC Docket No. 81-890

Competition, Common Carriers
(See: Common Carrier, Authorization-*AT&T Co.*)

Competitive Practices
(See: Common Carrier, Authorizations-*Satellite Business Systems*)

Customer Premises Equipment
(See: Common Carrier-*Telecommunications Equipment*)

Disqualification Technical or Engineering
(See: Application, Amendment of, Effect of Delay-*Colorado Television, Inc.*)

Disversification, of Control of Mass Media
(See: Application, Amendment of, Effect of Delay-*Colorado Television, Inc.*)

Dual City Identification
Petition for partial reconsideration of *Report and Order*, 95 FCC 2d 1253, denied. Petitioner has not set forth sufficient grounds for conditioning multi-city station identification on compliance with a signal coverage requirement.
—*Station Identification*
BC Docket No. 82-374

Educational Noncommercial Broadcast Service
Public radio and television stations deregulated; formal ascertainment requirements deleted and program logging requirements revised.
—*Public B/cing*
BC Docket No. 81-496

Educational Television Service
(See: Educational Noncommercial Broadcast Service-*Public B/cing*)

Employment, Equal Employment Opportunity Rule, Compliance With
License renewal applications granted. Where licensee's renewal application was held in abeyance beyond expiration of license term in order to monitor its EEO efforts, Commission will consider licensee's overall EEO performance during license term as well as its EEO performance during period of close scrutiny.
—*Walt West Enterprises Inc.*

Female Ownership-Participation, Comparative Credit for
(See: Amicus Curiae-*Horne Industries, Inc.*)

FM Station
In this *Memorandum Opinion and Order* adopted denying Motions for Stay regarding the Commission's earlier *Memorandum Opinion and Order*, 49 FR 19659, preempting state entry regulation that had

the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers.
—*Amendments of Parts 2 and 73*
BC Docket No. 82-536

Frequency Efficient Use of
Petitions for reconsideration of amendment of Parts 2 and 73 pertaining to preemption of state statutes regulating entry of radio common carrier paging services on FM subcarriers granted to an extent. Commission preempts state regulation that prohibits or impedes entry based on desire for spectrum efficient services fulfilling a public need. Petitions to repeal Section 22.516, traffic load studies, granted to an extent. Petition to consider variable-tuned FM subcarrier receivers denied.
—*Subsidiary Communications Authorization*
BC Docket No. 82-536

Interlocutory Ruling Appeal From
(See: Attorney As Witness-*Miller Broadcasting, Inc.*)

(See also: Administrative Law Judge, Authority of-*Central Pacific B/cing Corp.*)

International Maritime Satellite Communications
(See: Common Carrier-*COMSAT*)

Intervention, Request for Denied
(See: Amicus Curiae-*Horne Industries, Inc.*)

Issue, Avoidance of
(See: Administrative Law Judge, Authority of-*Central Pacific B/cing Corp.*)

Law, Violation of
(See: Character Qualifications-*Focus Television Co.*)

License, Renewal of
(See: Employment, Equal Employment Opportunity Rule, Compliance With-Walt-West Enterprises Inc.)

Logs, Maintenance of
(See: Educational Noncommercial Broadcast Service-*Public B/cing*)

Minority Ownership, Factor in Comparative Proceedings
(See: Amicus Curiae-*Horne Industries, Inc.*)

Mobile Services
(See: Common Carrier-*Telecommunications Equipment*)

Obscene, Profane, Indecent Language
(See: Character Qualifications, Nondisclosure-*Kaye-Smith Enterprises*)

Ownership, Minority, Comparative preference for
(See: Amicus Curiae-*Horne Industries, Inc.*)

Paging Service
(See: Frequency Efficient Use of-*Subsidiary Communications Authorition*)

Past Performance, Record of
(See: Comparative Hearing-*Intercontinental Radio, Inc.*)

Petition to Deny
(See: Employment, Equal Employment Opportunity Rule, Compliance With-*Walt-West Enterprises Inc.*)

Program Logs for Educational Stations
(See: Educational Noncommercial Broadcast Service-*Public B/cing*)

Programming Considerations
(See: Educational Noncommercial Broadcast Service-*Public B/cing*)

Programming Requirements
(See: Educational Noncommercial Broadcast Service-Public B/cing)

Reconsideration, Petition, for Denial of
Petition for reconsideration of *Clay Television, Inc.*, FCC 83R-80, 95 FCC 2d 1167 (1983), denied as moot.
—*Clay Television, Inc.*
BC Docket No. 81-690

(See also: Character Qualifications, Nondisclosure-*Kaye- Smith Enterprises*)

Renewal, Applicant v. New Applicant
(See: Comparative Hearing-*Intercontinental Radio, Inc.*)

Satellite Communications
(See: Common Carrier, Authorizations-*Satellite Business Systems*)

Separations Procedures
Commission adopted Reconsideration Order affirming earlier decision which preempted state actions requiring carriers to accept the use of seven-day periods for actual use measurements in connection with calculations for separations and settlements purposes. —*Separations Procedures*

Settlements
(See: Separations Procedures-*Separations Procedures*)

Site Availability
(See: Application, Amendment of, Effect of Delay in Filing-*Colorado Television, Inc.*

State Law
(See: Frequency Efficient Use of-*Subsidiary Communications Authorization*)

Station Identification
(See: Dual City Identification-*Station Identification*)

Stay
(See: FM Station-*Amendments of Parts 2 and 73*)

Stay Irreparable Injury
(See: FM Station-*Amendments of Parts 2 and 73*)

Stay Pending Appeal
(See: FM Station-*Amendments of Parts 2 and 73*)

Submarine Cable
(See: Common Carrier, Cable Authorization-*AT&T Co.*)

Subsidiary Communications Authorization
(See: FM Station-*Amendments of Parts 2 and 73*)

CATV Records for Public Inspection
CATV Registration Procedure
CATV Report and Order

Report and Order adopted terminating proceeding and deleting the requirement for cable television operators to file registration statements pursuant to Section 76.12 of the Commission's Rules when they add a television broadcast station.
—*Amendment of Part 76*
MM Docket No. 83-1292

FCC 84-274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 76, Subpart B of the Commission's Rules and regulations with respect to the filing of registration statements for the addition of television broadcast stations by cable systems (Section 76.12)	MM Docket No. 83-1292

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1984; Released: June 26, 1984

BY THE COMMISSION:

1. In its *Notice of Proposed Rule Making in MM Docket No. 83-1292*, 48 Fed. Reg. 55006 (December 8, 1983) (hereafter the "*Notice*"), the Commission proposed elimination of the requirement for cable television system operators to file registration statements, pursuant to Section 76.12 of the Commission's Rules, whenever they add a television broadcast station to an operational cable system. Interested parties were asked to file written comments on or before January 11, 1984, and reply comments were requested on or before January 26, 1984. In response, comments and reply comments supporting deletion of this requirement were filed by the following parties: Pepper & Corazzini; National Cable Television Association, Inc. ("NCTA"); Cable Television Operators ("CTO"); Tele-Communications, Inc. ("TCI"); joint comments by the

National Basketball Association, National Hockey League, North American Soccer League, and Major Indoor Soccer League ("Basketball"); Heritage Communications, Inc. ("Heritage"); American Legal Foundation; and Major League Baseball ("Baseball"). The following parties filed comments and/or reply comments opposing deletion of this requirement: D.S. Kiefer; KUTV, Inc.; West Virginia Educational Broadcasting Authority ("West Virginia"); KTHI-TV; and Morgan Murphy Television Stations ("Morgan").

2. Most of the parties supporting deletion argue that the present filing requirement is an unnecessary waste of both Commission and private resources, since cable system operators are also required to file annual FCC Form 325, Schedule 2, pursuant to Section 76.403 of the Commission's Rules, listing their entire complement of television broadcast signals. According to TCI, its staff spends 1,250 hours annually to assure compliance with this requirement alone. Heritage notes that 110 of its 119 systems serve fewer than 10,000 subscribers, and that filing these statements for 220 separate communities is unduly burdensome. NCTA adds that between December 1981 and November 1983, the cable industry filed 6,659 such unnecessary notices.

3. CTO suggests that Section 76.12 be deleted entirely, including notification to the Commission when a cable television operator commences service to a new community. CTO argues that the Commission should instead rely on the Initial Notice of Identity and Signal Carriage Complement filed with the U.S. Copyright Office, pursuant to Section 111 of the Copyright Act. CTO adds that any increased reliance on the FCC Form 325 should also prompt several revisions in utilizing it. Both CTO and TCI ask that the Commission adopt one uniform date for mailing it to the operators and another for receiving it from the operators, and that the information requested should also be for signal carriage as of a specific date. TCI notes that the information now obtained from the FCC Form 325, Schedule 1 also could be requested in the future through the FCC Form 325, Schedule 2, instead. In addition, CTO asks that the FCC Form 325 be amended to include a precautionary notice that filing it does not satisfy any Copyright Office requirements, and that the Commission eliminate the present request for information on "Local Programs, Services, Users and Capacities" since it is burdensome and frequently inaccurate. Furthermore, CTO suggests that future registration statements filed pursuant to Section 76.12 of the Rules require that cable operators identify the relevant headend community so that they will receive only one FCC Form 325.

4. Although they do not oppose the proposed change in Section 76.12 of the Rules, both Basketball and Baseball agree that retaining the requirement to register when a cable system commences service to a new

community is essential to their ability to assert their rights, pursuant to the sports blackout provisions of Section 76.67 of the Commission's Rules. According to Baseball, there were over 150 new communities served by cable during 1983 alone, and timely registration and public notice of these new community units enabled it to assert its rights, which would not have been possible for a prolonged period by use of the annual FCC Form 325 or through the Copyright Office's Initial Notice. Baseball states that the Register of Copyrights has recommended eliminating these Initial Notices also, and that in any event they are arranged alphabetically, not chronologically, so that it is virtually impossible to identify new communities being served by cable. However, Baseball agrees with CTO that any future registration statements filed pursuant to Section 76.12 of the Rules, should identify the system's headend community in order to simplify later filing of notices, pursuant to the sports blackout rule. Baseball, West Virginia, and Morgan all note that FCC Form 325 data is not current when it is filed, and that it never appears on public notice, as does the information from the registration statements. Given constant changes in the industry, resulting in some broadcast and non-broadcast services being added and some deleted almost daily, these parties do not believe that they can reasonably be asked to rely on the information generated by FCC Form 325.

5. In fact, West Virginia and Morgan, together with D.S. Kiefer, KUTV, Inc, and KTHI-TV, all oppose deleting the present requirement to file a registration statement with the Commission whenever a cable system adds a television station. Principally their concerns are that there would then be insufficient notice for stations which are entitled to assert carriage and/or network nonduplication protection rights, pursuant to Sections 76.57, 76.59, 76.61, or 76.92 of the Commission's Rules. West Virginia suggests that the only change that ought to be made in Section 76.12 of the Rules is to expand it to require that cable operators also file registration statements if they delete a television broadcast station. Morgan agrees with this suggestion, and argues that cable operators should also be required to serve copies of all registration statements on all television stations "involved in their operations". KUTV, Inc. suggests that if the Commission deletes the present registration requirement for the carriage of additional television broadcast stations, it should either exempt situations involving the addition of new network affiliated stations, or it should require notification of any such change in signal carriage on "every television station within whose specified zone the cable system operates".

6. Several of the suggestions advanced by CTO concerning modifications to FCC Form 325 and to our filing requirements pursuant to Section 76.12 of the Rules, including its complete deletion, substantially exceed

the scope of the present proceeding, and we decline to initiate these revisions at this time. However, we note that our present procedure of collecting FCC Form 325, Schedule 1 information separately from FCC Form 325, Schedule 2 data enables us to cull out systems which are presently operational so that only those systems receive the pre-printed Schedule 2 form. In turn, filing the Schedule 2 form simply involves correcting any inaccurate information and mailing it back to the Commission. This information, however, differs substantially from that now requested by the U.S. Copyright Office, pursuant to Section 111 of the Copyright Act. That form does not, for example, request data concerning frequency utilization, which is critical to our regulatory scheme, and we are not persuaded that we can confidently rely upon copies of this form for our regulatory purposes.

7. Furthermore, the Commission has previously rejected requests that cable operators be required to serve interested parties with copies of their registration statements, or that they be required to file a registration statement pursuant to Section 76.12 of the Rules with the Commission whenever they delete a television broadcast station. *Report and Order in CT Docket No. 78-206*, 69 FCC 2d 697, 704 (1978). None of the comments or replies submitted herein persuades us to depart from that decision.[1] At the time of the *Report, supra*, the Commission noted that its principal motive for replacing former Section 76.11 of the Commission's Rules with the simpler procedures in Section 76.12 was to increase its efficiency in expediting the initiation of new cable television services, but that this change did not in any way affect any substantive provisions of the Rules. Violations of the rules would still be addressed through the forfeiture and show cause procedures in Section 76.9 of the Commission's Rules, while requests for declaratory rulings and variances in applications of the rules would still be handled by means of the special relief provisions in Section 76.7 of the Commission's Rules. The situation remains unchanged today, and in this regard we are reminding cable operators of the necessity to submit any revision in the information they previously filed pursuant to Section 76.403 of the Rules concerning their channel capacity and its utilization whenever they petition the Commission for special relief from the rules.

8. Since that time, however, the Commission has deleted its restrictions on the importation of distant broadcast stations by cable television systems, which was one of the primary reasons it had previously required

[1] Similarly, the Commission has previously disposed of the issues relating to the identification of headend communities by cable operators for the purposes of Section 76.67 of the Rules, and nothing submitted herein persuades us to alter our prior determination. *Memorandum Opinion and Order in RM 4098*, 92 FCC 2d 1058, 1064-1065 (1982), *recon. granted*, __ FCC 2d __ (1984).

cable operators to file registration statements when they added a television broadcast station pursuant to Section 76.12. *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *stay denied*, 81 FCC 2d 395 (1980), *modified*, 82 FCC 2d 375 (1980), *stay granted sub nom. Malrite T.V. of New York, Inc. v. FCC*, No. 80-4120 (2d Cir. November 19, 1980) (order granting stay), *aff'd*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom. National Association of Broadcasters v. FCC*, 102 S.Ct. 1002 (1982). Therefore, although the staff has remained relatively current in processing the information generated from the registration statements filed by cable systems commencing operations, it has not routinely processed the data generated by the registration statements filed pursuant to Section 76.12 of the Rules for the addition of television broadcast stations since November 1982.

9. During this time we note that no party, including those participating in this proceeding, has demonstrated any injury resulting from our failure to process the information. Moreover, in reviewing our proposed action pursuant to the relevant provisions of the *Regulatory Flexibility Act*, P.L. 96-354, 94 Stat. 1165, 5 U.S.C. §§ 601-602 (1980), in an effort to determine if there will be a significant financial impact on a substantial number of small businesses, we agree with the majority of the parties herein that deletion of this provision will substantially reduce the reporting and record keeping requirements by cable television operators. Given the essentially duplicative information now generated by cable operators filing FCC Form 325, Schedule 2, pursuant to Section 76.403 of the Rules, and also filing registration statements for the addition of television broadcast stations, pursuant to Section 76.12 of the Rules, it appears that this situation constitutes precisely the sort of unwarranted burden the *Regulatory Flexibility Act, supra*, sought to abolish, and the sort of unnecessary paperwork that the *Federal Paperwork Reduction Act*, P.L. 96-511, 94 Stat. 2812, 44 U.S.C. §§ 3501-3520 (1980), targeted for elimination. Therefore, we cannot find that it is any longer in the public interest to retain the requirement previously imposed on cable television operators to file registration statements with the Commission, pursuant to Section 76.12 of the Rules, when they add a television broadcast station, and we will delete this provision.

10. Accordingly, IT IS ORDERED, That Section 76.12 of the Commission's Rules IS AMENDED, effective August 2, 1984, as set forth in the attached Appendix B.

11. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information on this matter, contact Angela Bayard Green, Cable Television Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, (202)632-7480.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC Dockets Branch, 1919 M St, N.W. Wash., D.C.

Appendix B

47 C.F.R. 76.12 is amended by revising the introductory paragraph to read as follows:

§ 76.12 Registration statement required.

A system community unit shall be authorized to commence operation only after filing with the Commission the following information:

(a)* * *

* * * * *

Appendix C

Final Regulatory Flexibility Analysis

I. *Need For and Purpose of the Rule*

Section 76.12 of the Commission's Rules was designed to simplify the certification procedures of former Section 76.11 of the Commission's Rules. Since that time, however, the Commission has deleted its restrictions on the importation of distant broadcast stations by cable systems, which was originally one of the primary reasons for requiring cable operators to file with us when they added a television broadcast station, thus substantially obviating the necessity for this requirement. Moreover, the Commission is retaining its separate requirement for cable operators annually to file FCC Form 325, Schedule 2, pursuant to Section 76.403 of the Commission's Rules, which lists each cable system's entire complement of both broadcast and non-broadcast services. However, Section 76.12 insofar as it requires initial notice of the commencement of operation of a new cable system and/or community unit is retained.

II. *Flexibility Issues Raised in the Comments*

The majority of the parties agree that deletion of this requirement will substantially reduce the reporting and recordkeeping requirements by cable television operators.

III. *Significant Alternatives Considered But Not Adopted*

Suggestions for adopting other amendments to the Commission's Rules were rejected because they substantially exceeded the scope of the present proceeding.

FM Station
Stay
Stay Irreparable Injury
Stay Pending Appeal
Subsidiary Communications Authorization

Memorandum Opinion and Order adopted denying Motions for Stay regarding the Commission's earlier *Memorandum Opinion and Order*, 49 FR 19659, preempting state entry regulation that had the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers.
—*Amendments of Parts 2 and 73*
BC Docket No. 82-536

FCC 84-313

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendments of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations	BC Docket No. 82-536
In the Matter of	
The Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters	Docket No. 21312 RM-2836

MEMORANDUM OPINION AND ORDER

Adopted: July 6, 1984; Released: July 12, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

1. In response to several petitions for reconsideration,[1] the Commission, on April 26, 1984, adopted a *Memorandum Opinion and Order* (MO&O) in BC Docket No. 82-536, regarding FM subcarriers.[2] That order

[1] Petitions for reconsideration were filed by National Radio Broadcasters Association, National Association of Broadcasters, the law firm of Fletcher, Heald and Hildreth, Telocator Network of America, Inc., and Reach, Inc.

[2] 49 Fed. Reg. 19,659 (May 9, 1984).

focused on the issue of preempting state entry regulation of paging services operating on FM subcarriers. Because state entry regulation was impeding Commission policies, developed pursuant to Section 301 of the Communications Act, that sought to increase competition and provide for the efficient use of the spectrum, we preempted those state entry regulations that had the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers. This action was designed only to ensure the accomplishment of legitimate federal interests, and was not intended to impinge upon any entry regulation, or any other kind of regulation, such as rate regulation, by state authorities if such regulation did not have the effect of prohibiting or impeding entry.

2. On May 23, 1984, the National Association of Regulatory Utility Commissioners (NARUC) and Telocator Network of America, Inc. (Telocator) filed Motions for Stay of the Commission's *Memorandum Opinion and Order* preempting state entry regulation. The FCC's *Memorandum Opinion and Order* in BC Docket 82-536 and *Second Report and Order* in Docket No. 21323 are the formal subject of a Petition for Review, case no. 84-1190, filed on May 18, 1984, by Telocator in the U.S. Court of Appeals for the D.C. Circuit. NARUC has filed a Motion for Leave to intervene in that proceeding. In the instant proceeding, NARUC requests that we stay only that portion of the *Memorandum Opinion and Order* which circumscribes the authority of the states to regulate entry of carriers providing paging on subchannels.[3] Telocator requests a stay not only of the *Memorandum Opinion and Order*, but also the *First Report and Order* in BC Docket No. 82-536[4] and the *Second Report and Order* in Docket No. 21312[5] (multichannel sound television), to the extent that these orders "authorize FM radio and TV broadcast licensees to provide paging service on a common carrier basis and preempt entry regulation of such services."[6]

3. In *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), the U.S. Court of Appeals for the D.C. Circuit spelled out the factors which must be considered regarding motions for stay of an administrative order. That test was subsequently modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).[7] In accordance with that standard, any request for a stay must demonstrate that absent the stay the petitioner will suffer irreparable injury, that

[3] NARUC Motion at 1, 3.

[4] 48 Fed. Reg. 28,495 (June 22, 1983).

[5] 49 Fed. Reg. 18,100 (April 27, 1984).

[6] Telocator Motion at 2-3.

[7] The *Holiday Tours, Inc.* test continues to be the applicable test in the D.C. Circuit today. *See Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982).

other parties will not be harmed by this stay, and that the stay is in the public interest. Additionally, the party requesting the stay must also demonstrate a substantial likelihood of success on the merits. The requestor's burden on the last requirement depends upon its showing on the first three factors. *See McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982).

4. NARUC and Telocator argue that their members will undoubtedly suffer irreparable injury if the Stay requested is not granted. NARUC contends that FM subcarrier paging providers will be soliciting business from exactly the same existing and potential customers as do certified paging providers. NARUC notes that "the only material difference between the new FM subcarrier paging operator and existing radio common carrier and wireline paging operators is that, in the case of FM providers, NARUC's members are precluded by FCC *Order* from carrying out their statutorily-imposed duty to regulate these entities in the interest of the public." To support its assertions of harm, NARUC also indicates that existing radio common carriers and wireline carriers subject to state regulatory jurisdiction can entirely evade and defeat state regulation by also providing paging services on FM subcarriers. Accordingly, NARUC argues that "any cease and desist orders, fines, etc., levied against a certificate carrier would be entirely ineffectual, because the same entity could merely operate its service on FM subcarriers, and do the things it could not do while it was a certificated carrier." According to NARUC, the result of the Commission's *MO&O* is the impairment of its members' statutory duty to ensure the adequacy of communication services and facilities and the fairness and reasonableness of rates and practices of paging service providers.

5. Telocator also argues that broadcast licensees providing subcarrier paging service "will have a massive and overwhelming signal coverage advantage vis-a-vis radio common carriers, and that this coverage advantage is the single most crucial competitive factor in the provision of paging service." This competitive advantage according to Telocator would be "especially devasting in the less populous urban areas, small towns and rural areas which comprise the vast majority of land mass in this country and in which most of the radio common carriers are located and provide their services." Therefore, Telocator argues that many radio common carriers are likely to be put out of business by subcarrier paging services.

6. With regard to the remaining criteria, NARUC and Telocator contend no harm would be caused to any other interested party if the relief sought in their Motions for Stay is granted. They contend that the only class of persons who could be adversely affected are potential FM subcarrier paging providers. NARUC also argues that, as a matter of public interest, permitting the FCC to implement its *MO&O* without final

resolution of the pending legal issue involving federal preemption would be an affront "to fundamental principles of federalism and comity between the Federal Government and the States."

7. Finally, NARUC and Telocator contend that the decision is legally unsound. NARUC argues that paging services are overwhelmingly intrastate and local exchange in nature. As such, they are within the jurisdiction of State Utility Commissions to regulate in furtherance of the jurisdiction conferred upon them by Congress. Additionally, NARUC argues that Section 301 of the Communications Act of 1934, as amended, which grants the FCC the authority to license facilities and to allocate spectrum does not provide the FCC with jurisdiction to override the regulatory authority of the states under Sections 2(b) and 221(b) to control the entry of common carrier paging providers. NARUC also asserts that the FCC fails to acknowledge that subsection 331(c)(3) of the Communications Act expressly precludes its preemption of state entry regulations. Additionally, Telocator maintains that because the Commission's decision will lead to dissimilar treatment between common carriers on FM subcarriers and all other common carriers the decision is not legally justified.

Discussion

8. Initially, we find that neither Telocator nor NARUC has demonstrated irreparable harm. Telocator argues that its members will suffer irreparable harm if the *Orders* in question are not stayed. In particular, Telocator alleges that the signal coverage advantages that broadcast subcarrier paging services will have over radio common carriers will create irreparable harm to existing radio common carriers. The first *Report and Order* in this proceeding addressed Telocator's concerns. Nevertheless, we wish to add a few additional observations at this time because Telocator fails to address the countervailing advantages its members, the RCCs, will have. In the affidavit of Thomas H. Lamoureux submitted with Telocator's *Motion for Stay*, Mr. Lamoureux indicated that in urban areas radio common carriers have already developed multi-transmitter networks which in many cases provide "even better coverage than can be afforded by SCA's." Additionally, in the March 1983 issue of *Telocator* Volume 7, No. 3, the engineering firm of Sachs/Freeman Associates, Inc. concluded that existing authorized paging facilities would serve a greater area than subchannels on Class A FM stations, and will serve in an area approximately equal to subchannels on Class B FM stations. Only subchannels on Class C stations would materially out perform the traditional paging facilities, but even then, the Class C stations would have to be operating with an antenna having a height above average terrain (HAAT) of at least 500 feet. Of the 1,173 Class C stations only about 20% are operating at or near maximum facilities. On

the basis of the study reported by Telocator, it is reasonable to assume that any competitive advantage to traditional paging systems from larger service areas would only occur with regard to those Class Stations that exceed the equivalent of 500 feet HAAT. As we indicated in the *First Report and Order*, any possible inequity in technical facilities is overshadowed by the public interest benefits to be derived from innovative and spectrum-efficient subcarrier services. Moreover, these differences in service areas are affected by the penetration problems FM subcarriers will likely experience[8] and the fact they cannot fill-in "dead shots" as easily as conventional radio common carriers. *See* Reiter, *Caveat Emptor on FM Subcarrier*, Broadcasting, June 4, 1984, at 26. *See also First Report and Order*, BC Docket No. 82-536, FCC 83-154, at paragraph 28, footnote 14. In light of the limited number of facilities involved and the fact that it will take time for them to become licensed and operable, any damages to the RCCs should be minimal. Moreover, any possible harm is not irreparable harm because it Telocator should succeed on its appeal and broadcasters are required to cease providing paging services to uncertificated carriers, any customers the RCCs have lost will likely return to them. Under such circumstances, any monetary losses should be minimal.

9. Similarly, NARUC's concern that existing radio common carriers that are currently subject to state regulations can "entirely evade and defeat state regulation by also providing paging services on FM subcarriers where they would operate under the FCC's full entry policies" does not constitute irreparable harm. The preemption is limited and the states can easily resume regulation if Telocator is successful on appeal. Our preemption decision only extends to entry requirements that have the effect of prohibiting or impeding entry. Indeed, states may require notification before service is commenced. Furthermore, contrary to NARUC's contentions, states may regulate rates and practices. Accordingly, we do not believe state regulation will suffer irreparable harm from our preemption decision.

10. Additionally, as stated in the *MO&O*, we recognize that because we are engaging in the limited preemption of common carrier radio services offered on FM subcarriers, there will be some disparity in treatment of similar services. However, because of the potential disparity in treatment, we indicated in the *MO&O* that we expect to issue a notice of proposed rulemaking addressing the need to preempt state regulation that impedes the entry of conventional common carrier mobile services in the near future.

[8] Geographical barriers, such as hills, as well as man-made obstacles, such as bridges and buildings, have a greater effect on the penetration of FM broadcasting frequencies than on conventional radio common carrier frequencies.

11. Second, NARUC's argument that there would be no harm to other parties if the Stay were granted because the only other class affected are potential FM subcarrier providers is meritless. As we indicated in the *Memorandum Opinion and Order*, we intended this additional spectrum to be a source of additional revenue for broadcasters. In particular, we believe such additional revenues would greatly assist public broadcasters who are facing reductions in federal aid. Thus a stay could reduce their available revenues. Moreover, the National Association of Broadcasters, in comments filed in their *Opposition to Motions for Stay* indicated that other parties who have organized businesses, ordered equipment, and borrowed funds in contemplation of commencing operation would also be harmed if the Stays were to be granted.

12. Third, and perhaps most importantly, the public interest and need would also be harmed if these Stays were granted. Granting a stay would further delay the public's opportunities to take advantage of the additional paging services.

13. Because, on balance, the equities addressed in the first three factors militate strongly against our staying the decisions, Telocator and NARUC have a "heavy" burden of demonstrating a substantial likelihood of success on the merits. *McSurely v. McClellan, supra.* They have not met that burden. All their legal arguments were adequately addressed on the Order. The *MO&O* addresses the concerns raised by NARUC with respect to jurisdiction over common carrier paging services as expressed in Sections (2)(b) and 221(b) of the Communications Act. Additionally, NARUC's argument that Section 331(c)(3) of the Communications Act expressly precludes FCC preemption of state entry regulations was also addressed in the *MO&O*.[9] Moreover, NARUC and Telocator have not demonstrated that any of our prior legal reasoning was incorrect. Therefore, these parties have not demonstrated a strong case that they are likely to prevail on the merits of the appeal.

14. Accordingly, IT IS ORDERED, that the Motions for Stay filed by the National Association of Regulatory Utility Commissioners and Telocator Network of America, Incorporated, pertaining to preemption of state statutes regulating entry into paging services on FM subcarriers ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[9] *See Memorandum Opinion and Order* in MM Docket 82-536, 49 Fed. Reg. 19,659 (May 9, 1984) at para. 28.

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Motions for Stay of the Commission's Orders in the FM and TV Subcarrier Proceedings (BC Docket No. 82-536 and Docket No. 21312, RM-2836).

I dissent from the majority's refusal to stay that part of the Reconsideration Order[1] in this proceeding preempting state regulation of strictly local paging operations on subcarrier frequencies.

For reasons discussed in my dissent from that Reconsideration Order, petitioners, the National Association of Regulatory Utility Commissioners and Telocator Network of America, Inc., have a substantial likelihood of prevailing on the merits of that limited issue. On that basis alone, a partial stay is warranted. *See McSurely* v. *McClellan*, 697 F. 2d 309, 317 (D.C. Cir. 1982).

[1] *Memorandum Opinion and Order on Reconsideration* in BC Docket No. 82-536, FCC 84-187 (released May 2, 1984).

Common Carrier, Cable Authorization
Submarine Cable

Commission *Order and Authorization* adopted granting application to construct and operate eighth transatlantic cable (TAT-8) which will provide digital, fiber optic capacity between the United States and both the United Kingdom and France.
—*AT&T Co.*

FCC 84-240

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Co. FTC Communications, Inc. Hawaiian Telephone Company ITT World Communications Inc. RCA Global Communications, Inc. The Western Union Telegraph Company TRT Telecommunications Corporation Western Union International, Inc.	File No. I-T-C-84-072
Application for authorization under Section 214 of the Communications Act of 1934, as amended, to construct and acquire a high capacity, digital, submarine cable system between the United States and both the United Kingdom and France.	

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 24, 1984; Released: June 8, 1984

BY THE COMMISSION: COMMISSIONER DAWSON CONCURRING IN THE RESULT.

1. The Commission has before it an application filed jointly on February 6, 1984, by certain common carriers, collectively referred to as the United States International Service Carriers ("USISC's")[1], for authori-

[1] The applicants are the American Telephone and Telegraph Company ("AT&T"), FTC Communications, Inc. ("FTCC"), Hawaiian Telephone Company ("HTC" or "Hawaiian"),

ty pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, to construct and operate the eighth transatlantic submarine telephone cable ("TAT-8"). TAT-8 will be owned jointly by the applicants, the telecommunications administrations of twenty European countries who are members of the CEPT[2], and one Canadian entity, Teleglobe Canada ("Teleglobe").[3] The applicants propose to put the cable into service in 1988. It would be the first submarine cable to employ digital fiber optic technology and would serve the heavily-trafficked North Atlantic route.

2. Public notice of the filing of the captioned application was given on February 8, 1984. In response to the notice, Aeronautical Radio, Inc. ("Arinc") filed a petition to deny on March 9, 1984. GTE Sprint filed comments on the same date and the Communications Satellite Corporation ("Comsat") filed comments on March 13, 1984, accompanied by a motion for leave to file its pleading out of time. AT&T and ITT filed oppositions to the petition to deny and responses to the comments on March 22, 1984. An opposition to the petition to deny was also filed on March 22 by Hawaiian. On March 30, 1984, Arinc filed a reply to the oppositions. On the same day, we received a "response" to the applications, the petition to deny and the comments listed above from the National Telecommunications and Information Administration ("NTIA") accompanied by a motion for leave to file a response. Arinc replied to NTIA's pleading on April 12, 1984.

3. Based on our review of the application, the comments, and the policies and information developed in the North Atlantic facilities planning process, we have decided to grant the application, subject to certain conditions.[4]

ITT World Communications Inc. ("ITT"), RCA Global Communications, Inc. ("RCA"), the Western Union Telegraph Company ("Western Union"), TRT Telecommunications Corporation ("TRT"), and Western Union International, Inc. ("WUI").

[2] Conference European des Administrations des Postes et des Telecommunications, an association of the state owned and operated postal and telecommunications entities in 26 European nations.

[3] With the exception of WUI, the applicants also jointly filed an application for a license to land and operate the TAT-8 cable pursuant to 47 U.S.C. §§ 34-39 (1980) (the submarine cable landing licensing act). WUI's parent company, MCI International, Inc., joined in the license application.

[4] After reviewing both Comsat's and NTIA's motions, we have decided to grant them and admit their pleadings. With respect to Comsat's pleading, we note that our acceptance of the late filing prejudices no applicant's rights since those who responded to the comments addressed Comsat's as well. With respect to NTIA's late filing, we note that Arinc was the only party entitled under our rules to reply to NTIA's opposition to Arinc's petition. By letter dated April 9, 1984, the Chief, International Facilities Division, authorized Arinc to file its April 12 reply in advance of a ruling on NTIA's motion so that the pleading cycle precipitated by NTIA's opposition would be complete in any case.

I. Description of Proposed Facilities

A. Cable Configuration and Technology

4. The cable proposed by this application will run between an existing cable station in Tuckerton, New Jersey to a point in the Atlantic just off the European continental shelf, at which the cable will branch into two legs, one 280 miles in length which terminates at an existing cable station in Widemouth, United Kingdom, and one 168 miles long terminating at an existing cable station in Penmarch, France. The division into two branches, and switching between them, will be accomplished by a "branching unit" installed at the point of division. This basic system configuration, with one North American and two European landing points, is referred to by the applicants as the "single-bident". This configuration is represented in schematic form in Appendix A to this Order.

5. The applicants, the CEPT entities, and Teleglobe (hereinafter "co-owners") propose to execute a Construction and Maintenance Agreement ("CMA") which describes the cable system's components in greater detail and sets forth the rights and obligations of the co-owners with respect to the ownership, construction, operation, maintenance and use of the cable. The co-owners have already initialed the CMA, and hope to formally execute the final agreement without any substantial changes in June of 1984. The applicants have included the CMA as Appendix B to their application.

6. As described in the CMA, the proposed TAT-8 system consists of four segments. The first three, segments A, B, and C, are the cable stations in Tuckerton, Widemouth, and Penmarch, respectively. The fourth segment, segment D, is the submarine cable portion of the system (including four 140 megabit per second ("Mbps") digital input/output ports at the cable ends) and the branching unit. This segment is further subdivided into subsegments D-1 through D-3. Subsegment D-1 runs between the Tuckerton station and the branching unit and includes the branching unit. Subsegment D-2 runs between the branching unit and the Widemouth station. Subsegment D-3 runs between the branching unit and the Penmarch cable station. The digital input/output ports at each cable station are included in the relevant subsegment.

7. The co-owners requested, and AT&T, Standard Telephones and Cables, PLC, of the United Kingdom ("STC") and Cables de Lyon/CIT Alcatel of France ("Submarcom") each submitted, bids to construct Segment D in its entirety. Rather than selecting a single firm, however, the co-owners have decided to have each of the three bidders construct a portion of the cable. Although the price of AT&T's original proposal was 7.2% lower than the joint construction effort now proposed, the co-owners accepted the higher cost for multiple builders in order to accommodate

certain countries' demands for participation by their domestic industries and to stimulate competition in cable construction. The applicants emphasize that, under the final proposal, U.S. companies will construct a portion of the TAT-8 system comprising approximately 75% of the total system cost.

8. Subsegment D-1 will be constructed by AT&T. Using AT&T's "SL" design, the cable will consist of two working optical fiber pairs with associated regenerators and supervisory circuits. The cable will also contain a third fiber pair to serve as a standby transmission path to which a signal could be switched between repeaters if required for restoration purposes.[5] The cable structure itself consists of a king wire with nylon overjacket surrounded by six optical fibers in a helical path embedded in an extruded elastomer. A DC power conductor/ strength member of a double layer of strength wires surrounds the fiber structure and the whole is overclad with a swaged copper tube. Finally, the entire structure is insulated with polyethylene.

9. AT&T will also construct the branching unit using its SL design. The unit incorporates a shore-controlled power path switch through which the cable can be series powered from Tuckerton to either one of the European cable stations. The co-owners apparently are still considering an option to incorporate in the branching unit shore-controlled lightguide switching which would permit all traffic to be switched wholly to the U.K. leg or to the French leg.

10. AT&T's SL design provides for redundancy of the laser transmitter as well as regenerator section-by-section redundancy through the standby optical fiber pair, its associated regenerators, and the protection switching in the repeaters. In addition, the SL design uses redundant equipment with automatic protection switching for the terminal transmission equipment and the high voltage power feed equipment.

11. Subsegments D-2 and D-3 of the system will be constructed by STC and Submarcom, respectively. STC will use its NL-2 design which incorporates two fiber optic pairs with associated regenerators and supervisory circuits. The cable structure is composed of the optical fibers interleaved with nylon filaments and bound to a king wire with a helically wrapped cord. This structure is filled with a viscous compound and wrapped with a DC power conductor/strength member with a die-closed aluminum C-tube. The whole unit is then surrounded with two layers of counter-wrapped strength wires with polyethylene insulation over the strength member. Submarcom will use its S280 design for subsegment D-3. The design employs two fiber optic pairs with associated regenerators

[5] Although this third fiber pair does not appear in the schematic diagram of the system which is included as appendix C to the Section 214 application, it is reflected in the description of the system at page 8 of the application.

and supervisory circuits. The cable structure consists of the optical fibers embedded in a helically grooved plastic member which is filled with a viscous compound and over-wrapped with a plastic sheath. This element is paired with a DC power conductor/strength member of a double layer of strength wires and both are overclad with a swaged copper tube which is covered in turn with polyethylene insulation.

12. Both the NL-2 design and the S280 design use redundant equipment with automatic protection switching for the terminal transmission equipment and the high voltage power feed equipment. Both designs also use laser transmitter redundancy with the NL-2 using two transmitters per regenerator while the S280 design uses four transmitters per regenerator.

13. The entire cable system will be armored in shallow water and, to protect the cable from fishing activities, will also be buried on the continental shelves off the New Jersey, U.K., and French coasts.

14. At each of the three cable stations, the cable will be interconnected with the domestic networks in the host country. The system's capacity will also be extended via requisite transiting facilities to the borders of countries participating in the TAT-8 system or to the terminals or earth stations of other international cable or satellite systems. Thus, TAT-8 capacity will be used for services between countries beyond those in which the cable lands.

B. Digital Technology

15. The TAT-8 cable will be the first transatlantic use of digital fiber optic technologies. Previous transatlantic cables all have been analog cables. Digital fiber optic technology produces a transmission system which differs significantly from conventional analog cables. In a digital system, communications are converted from a wave function into a series of binary digits or "bits". (Obviously, in the case of data communications, no conversion is necessary since data communications by definition are those which consist of such a series.) These bits correspond to discrete differing states that can be induced in a given transmission medium. Fiber optic digital systems use light waves as the transmission medium. In an analog system, on the other hand, communications are represented in their original wave form. They are transmitted as continuous electrical signals which carry information by means of variations in amplitude or frequency.[6]

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[6] As a result of its technical characteristics, a digital fiber optic system can have lower noise levels, lower data error rates, and accommodate a greater range of services, including wide-band data and video services, than can an analog system. See Policies for Overseas Common Carriers, 84 FCC 2d 760, 766-768 (1981).

16. Because of the change in technology from analog to digital, the co-owners have defined the capacity of the system in terms of bit rate rather than circuits. That is, capacity in the TAT-8 system is defined in terms of the number of information "bits" which can be transmitted per unit of time. For purposes of assessing the system's capacity, and of defining and allocating ownership interests in the cable, the applicants have developed the concept of a "fundamental unit of ownership." A fundamental unit of ownership is a theoretical unit consisting of one bit per second ("bps") in each direction. These units are grouped in sets of 73,684.656 which are called Minimum Assignable Units of Ownership ("MAUO's"). The number 73,684.656 represents a basic usable bit stream of 64,000 bps plus an additional 9,684.656 bps necessary for multiplexing purposes. Each fiber pair in the cable system has a capacity of two 140 megabits per second ("Mbps") streams or 3,780 MAUO's. Since there are two fiber pairs, the total system capacity is 7,560 MAUO's.

17. A MAUO also represents the unit of measure for ownership purposes, similar to the single circuit of analog cables. The capacity of the system has been assigned to the co-owners in MAUO's, according to a schedule which appears as Schedule C of Appendix B to the Section 214 application. We have attached the schedule to this Order as Appendix B.

18. In addition to changes in the method of defining and allocating capacity, the use of digital fiber optic technology has prompted the development of new circuit multiplication techniques. For the TAT-8 system, the applicants propose to use "digital circuit multiplication equipment" ("DCME"), a new technology developed by AT&T which currently can derive 5 voice paths per MAUO. Thus, the maximum number of voice paths which the TAT-8 system could produce, if its capacity were devoted solely to voice services, would be 37,800. The application does not state whether the applicants will provide the requisite DCME or whether carriers or users will be expected to supply their own.[7] The application estimates the capital cost of the DCME to the $75,000 per DCME terminal and $3,000 per 2 Mbps terminal for multiplex equipment.

19. A digital transatlantic cable requires an additional technical innovation. The digital standards of North America and Europe differ from each other as to the bit rate of the four multiplexing levels and the use of Mu-law versus A-law encoding for voice signals. In order to interconnect differing digital networks via TAT-8, the applicants propose to use a hybrid hierarchy of multiplexing that uses three levels. To implement this arrangement, the TAT-8 system will rely upon a "multiplex system converter" and the digital multiplex to be installed at both ends of the cable. The result of this arrangement is that both the North

[7] According to ¶ 11(i) of the CMA, DCME, if used, will not be considered part of the TAT-8 system.

American and European co-owners will incur the costs of making the two digital systems compatible. The applicants maintain that their inter-working arrangement complies with CCITT Recommendation G.711 which provides that paths between countries with differing speech encoding laws should carry signals encoded in accordance with the A-law, which, in the case of TAT-8, is that used by CEPT. The details of the inter-working arrangement are set forth in Attachment G to the application.

C. Allocation of Capacity, Costs, and Ownership Interests

20. The CMA (referenced in paragraph 4, *supra*) provides for the allocation of capacity, ownership interests, and the capital, operating, and maintenance costs of the system. Segment A (the Tuckerton cable station) will be owned by AT&T; Segment B (the Widemouth cable station) by British Telecommunications ("BT"); Segment C (the Penmarch cable station) by the Ministere des Postes, des Telecommunications et de la Telediffusion of France ("French PTT"). Each party to whom the CMA assigns capacity has an indefeasible right of use ("IRU") in each of the cable stations. Segment D (the cable) will be owned in common by the co-owners in undivided shares. The ownership shares of the co-owners as well as their shares of the capital, operating, and maintenance costs of Segment D are allocated in the same proportions as the capacity assigned to them. Schedule B-1 of the CMA lists in percentages each co-owner's ownership share of Segment D and its costs according to the capacity allocations listed in Schedule C of the CMA. Schedule B-1 provides that 50 percent of the cable will be owned by, and 50 percent of the costs allocated to, the "Western parties": Teleglobe (1.35582%), AT&T (36.68651%)[8], FTCC (1.28307%), HTC (0.19180%), ITT (3.09524%), RCA (1.50132%), TRT (1.28968%), Western Union (1.53439%) and MCI International, Inc. ("MCII") (3.06217%).[9] The other 50% of the cable and its costs will be allocated to the Eastern parties. In addition, Schedule B-2 of the CMA sets forth the allocation of Segment A (the Tuckerton cable station) to the Western Parties in percentages as follows: Teleglobe - 2.71164%; AT&T — 73.37302%; FTCC — 2.56614%; HTC — 0.38360%; ITT — 6.19048%; RCA —3.00264%; TRT — 2.57936%; Western Union — 3.06878%; MCII —

[8] In a footnote to Schedule B-1, the CMA states that Transpacific Communications, Inc. (an AT&T subsidiary) will "own and be responsible for the capital, operating and maintenance costs of 36.68651% of segment D . . . within the United Kingdom and France, including their terrestrial waters" while AT&T will "own and be responsible for the . . . costs of the remainder of the 36.68651% of Segment D."

[9] According to footnote 4 to Schedule B-1 of the 214 application, MCII will own and be responsible for the costs of that portion of the cable allocable to the capacity assigned to MCII's subsidiary, WUI.

6.1243%.[10]

21. The applicants estimate that the cost of the TAT-8 system will be approximately $335.4 million, including cable station common plant (land and buildings) but excluding interest during construction, which is estimated to be approximately $27 million. The applicants claim that they will bear approximately 97% of the $0.6 million estimated capital costs of segment A and approximately 49% of the $333 million estimated capital costs of segment D[11] for a total investment by the applicants of approximately $162.6 million. The capital cost per half-MAUO for the applicants would be approximately $22,000. If the cable capacity were devoted exclusively to voice services, the cost for half of a derived voice path for the applicants would be approximately $5000.[12]

22. The allocation of capacity, upon which the ownership and cost shares described above are based, is set forth in Schedule C of the application. Each MAUO is shared jointly by a Western party and an Eastern party for use in providing service between the two countries involved, whether to points within the countries or to points reached by transiting them. Thus, each co-owner owns a half-interest in its respective MAUO's.

23. The application proposes two methods for making system capacity available to non-owners. For service to certain non-CEPT countries listed in Appendix E to the application[13], BT and the French PTT will purchase MAUO's jointly with the applicants on behalf of administrations in those countries and will convey IRU's to the non-owners. For all other non-owners who may wish to use the TAT-8 system, be they PTT's in countries not party to the CMA or U.S. carriers not party to the application, the application notes that TAT-8 capacity in excess of that required to meet the co-owners' "aggregate requirements" will be available to accommo-

[10] Footnote 1 to the schedule imposes the same condition regarding MCII's share of Segment A costs as that described in n. 9, *supra*.

[11] We assume that the difference between the $335.4 million figure for total system cost and the $333.6 million figure for segments A and D is attributable to the costs of segments B and C.

[12] These figures were arrived at as follows. For costs per half-MAUO, we divided the total cost allocated to the applicants ($162,600,000) by the number of half-MAUO's assigned to them (7,560). For costs for one half of a derived voice path, we divided total cost by the number of possible voice paths derivable using current DCME technology (37,800) and added our estimated costs for DCME and MSC equipment per derived channel. At p. 25 of their application, the applicants refer to "the capital cost of a basic voice grade half-circuit (MAUO) in TAT-8 ($22,000)." We assume that the parenthetical MAUO refers to a half-MAUO.

[13] The countries are Algeria, Bangladesh, Bulgaria, Czechoslovakia, Egypt, German Democratic Republic, Hungary, India, Israel, Ivory Coast, Kuwait, Lebanon, Liberia, Malta, Morocco, Oman, Pakistan, Poland, Romania, Saudi Arabia, Senegal, Syria, Tunisia, and the USSR.

date non-owners' needs. This capacity has been allocated to the owners in proportion to their facilities requirements forecasted for the period 1988-95. The CMA contains a provision[14] permitting owners to make any of their assigned capacity available to other telecommunications entities, on a basis "other than by transfer of an ownership interest" (i.e., on an IRU or lease basis only), subject to the consent of the party with whom the capacity is jointly held.

24. The applicants do not propose the creation of a commonly held pool of U.S. MAUO's for later distribution as IRU's (such as that formed for TAT-6 in *American Telephone & Telegraph Co.*, 35 FCC 2d 801 (1972)) nor do they commit themselves to a policy of voluntarily providing IRU's to existing or potential carriers (such as that provided for in the TAT-7 authorization, *AT&T Co.*, 73 FCC 2d 248 (1979)). Instead, they rely on the availability of excess capacity as described above to meet the needs of additional carriers or countries.

II. Background

25. This application raises a number of issues which we dispose of below. Before doing so, however, we wish to point out that there are some issues, such as those relating to projected traffic volume, timing, configuration, and the introduction of a digital versus an analog cable, which we have previously considered in our on-going facilities planning proceedings. In addition, as part of our on-going facilities planning effort in *Policies for Overseas Common Carriers*, CC Docket No. 79-184, we previously determined that construction of a TAT-8 fiber optic cable as early as 1988 would serve the public interest. We received in that proceeding much of the empirical data relevant to our analysis of this application. Our prior deliberations are pertinent to our consideration of the application now before us. Accordingly, we will begin our analysis of this application with a brief review of the facilities planning process which preceded it and the issues considered therein.

Facilities Planning Context

26. On August 1, 1979, we released a Notice of Inquiry ("NOI") initiating CC Docket No. 79-184. *Policies for Overseas Common Carrier Facilities*, 73 FCC 2d 193 (1979). The purpose of the inquiry was to begin the process for developing guidelines and policies for the construction and use of cable and satellite facilities in the North Atlantic region, which we could use in acting upon applications proposing specific facilities for the period 1985-1995.[15] On April 13, 1980, we issued a second NOI specifying

[14] See application, Appendix B, Paragraph 11(h).

[15] The planning process got its start in June of 1970, when we initiated Docket No. 18875, Inquiry into Policies to be Followed in Future Licensing of Facilities for Overseas Services, through the release of a Notice of Inquiry, Overseas Communications, FCC 70-

the procedures for our inquiry and requesting the detailed information required to formulate our policies and guidelines. *Policies for Overseas Common Carrier Facilities*, 76 FCC 2d 522 (1980).

27. On November 7, 1980, we released a Notice of Proposed Rulemaking ("NPRM") in Docket 79-184 (*Policies for Overseas Common Carriers*, 82 FCC 2d 407 (1980)) in which we offered for public comment the results of our initial review of the information and alternative proposed plans submitted by carriers in response to the second NOI. We had received a wide range of alternative proposed facilities construction and use plans for the 1985-95 period which contemplated the phased-in introduction of a variety of satellite and cable transmission facilities, including a high-capacity, digital, fiber-optic cable with branching capacity permitting multiple landing points for a single cable.

28. Our evaluation of the various plans was based, *inter alia*, upon an analysis of the available traffic forecasting data and the demand flexibility of the plans themselves. A staff plan had been designed to show the minimum facilities that would be required to meet the demand forecasted for the planning period. It indicated that no new cable facility would be needed to meet the forecasted demand until 1991. The plan submitted by the USISC's (Plan 1) indicated that capacity would exceed demand by an amount ranging from 39 to 117 percent during the 1985-95 planning period if a fiber optic cable were introduced in 1988 and a second in 1992.[16]

29. As a result of our analysis of the empirical data on future demand, and the proposals regarding facility capacity submitted to us, we came to a number of tentative conclusions. First, we thinned out the field of alternative plans we would continue to review by identifying those with significant deficiencies and eliminating them from further consideration. Second, we concluded that there was no discernible need for the introduction of an analog cable prior to the availability of a fiber optic digital cable which we assumed would have a lower per circuit cost. We also concluded that, even with the deployment of lower capacity Intelsat satellites, circuit demand nevertheless would be met if introduction of a fiber optic cable were delayed by as much as three years, until 1991.

620, 35 Fed. Reg. 10166 (June 16, 1970). In that docket, we noted that an ad hoc review of international facilities needs, which results from authorization solely on an application-by-application basis, was no longer adequate to meet the statutory mandates of the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.* and the Communications Satellite Act of 1962, 47 U.S.C. §§ 701, *et seq.* We also affirmed a belief that our licensing procedures should be employed in furtherance of efficient facilities planning based on information supplied by the carriers and integrated into a comprehensive facilities plan. Docket 18875 focused on the 1970-1985 time-frame and the facilities needs arising therein.

[16] The plan also assumed the use of larger-capacity B-7 Intelsat VI satellites.

30. We also noted that we needed more detailed information on the cost of introducing a fiber optic cable in order to weigh those costs against the benefits of pursuing the Commission's policy of encouraging the development and use of new technologies. Finally, on a cautionary note, we emphasized the vagaries inherent in long-range forecasting of traffic, costs, and system capacities. Accordingly, we decided to focus our attention in the rulemaking upon the early part (1985-92) of the planning period with particular emphasis on our decisions regarding design (capacity) of the Intelsat VI satellite series and the initial operation date for a fiber optic cable. We delegated authority to our staff to convene public meetings of the parties as a vehicle for the early generation and exchange of basic planning information.

31. In January of 1981, we adopted a report and order in Docket 79-184, *Policies for Overseas Common Carriers,* 84 FCC 2d 760 (1981) ("January Order"), in which we provided the USISC's and Comsat with general policy guidelines defining a range of acceptable alternatives for major facilities construction. Of significance to the TAT-8 application was our conclusion that no new cable facility was likely to be needed prior to 1988 but that *the public interest would be served by the introduction of a fiber optic, digital cable as early as 1988.* We determined that a fiber optic cable was preferable to introduction of an analog cable because (1) it would provide considerably greater capacity at a lower cost per circuit; (2) as a digital transmission medium, it would be a superior technology; and (3) it would accommodate a greater range of services than the conventional analog design cable.

32. We then discussed the proposed timing of the fiber optic cable's introduction. On the one hand, the USISC's argued that early introduction of a fiber optic cable would increase demand flexibility, provide better service reliability through added capability to restore service following a facilities failure, enhance development of new services through added wideband data and video capability, be compatible with developing domestic switched digital networks, and encourage AT&T to maintain its world leadership in submarine cable technology development. In addition, CEPT and Teleglobe had stated their position that such factors as diversity, cable satellite circuit balance, flexibility to accommodate delay and implementation of new facilities, traffic growth, and the high risks of simultaneous implementation of new, untried technologies in both cable and satellite systems, augurred in favor of introducing a fiber optic cable in 1988. We did not dispute these benefits.

33. On the other hand, we noted that introduction of a fiber optic cable could be delayed until the end of 1990 and there would still be approximately 20% excess capacity in North Atlantic facilities. In addition, we estimated the rough, "upper-bound" cost savings to U.S. carriers (and

thus U.S. ratepayers) accruing from delay in the introduction of the fiber optic cable until year-end 1991 to be about $28 million. Weighing against these two concerns was what we identified as a technological risk that the Intelsat VI satellite series would not be operational on schedule or would not use advanced modulation technologies, which would increase capacity, on both the 6/4 and 14/11 GHz frequency bands. Our analysis of available capacity had assumed the existence and advanced modulation of Intelsat VI satellites on schedule. We determined that a delay in the fiber optic cable would leave only a one year "safety margin" (basically, the period from early 1987 to 1988) between the scheduled operation of the Intelsat VI's and the point at which demand would outstrip existing capacity. Given the small safety margin available, the level of technological development risk, and the inherent uncertainty of our long-range forecasts, we concluded that the risk reduction of an early fiber optic cable introduction far outweighed the projected cost savings from delaying introduction. Accordingly, we determined that, based on then-current information, the public interest would be served by introduction of a fiber optic cable as early as 1988.

34. In addition to our formal proceedings in Dockets 18875 and 79-184, we have participated with our foreign counterparts in a series of meetings in the United States, Canada and Europe to discuss facility requirements for the North Atlantic region. These North Atlantic Consultative Process meetings, attended by Comsat, the USISC's, Commission staff, representatives of the State Department and NTIA, and our foreign partners, have focused since 1979 on the cable and satellite facility needs for the 1985-95 period. The underlying logic of these international meetings, which we continue to endorse, is that the rationale, planning, construction and use of international facilities are not within the jurisdictional sovereignty of any one country and must, in a collegial atmosphere, be coordinated among the potential owners and appropriate government agencies.

35. Topics discussed at these consultative process meetings include traffic forecasts, new services, impact of technology on facility requirements, submarine cable technology, satellite technology, satellite launch options, restoration principles, loading plans, decision timetables and facility options. All parties in the consultative process support the process and recognize that facilities have become too expensive to permit ad hoc review of facility needs on a case-by-case basis.

36. In the initial planning meetings for the 1985-95 period, the participants in the consultative process recognized the economic and technological benefits of a fiber optic cable system. Teleglobe and the CEPT countries generally favored the introduction of such a cable as soon as possible but also supported the introduction of a TAT-8 analog cable if the fiber optic cable could not be placed in service by 1988. The United

States' position, as enunciated in the 1981 *January Order*, was that an additional analog cable would be desirable only if a fiber optic cable could not be placed in service by 1988 *and* if the INTELSAT VI series of satellites was delayed beyond 1988. Since a fiber optic cable system will be available for service in 1988, the CEPT/Teleglobe parties have now terminated their support for an additional analog cable. (The INTELSAT VI series of satellites are now scheduled to be launched in the 1986/87 time frame). The United States, Teleglobe and CEPT positions are therefore now in harmony. We believe that the consultative process has been an invaluable vehicle for the reasoned planning of new facilities. We anticipate that future meetings with our foreign colleagues will continue to be productive and provide a forum for an open exchange of information and views.

III. Discussion

37. The net result of our efforts in facilities planning is that the overarching question of whether the public convenience and necessity would be served by construction of a fiber optic digital cable between the U.S. and Europe has been answered in the affirmative. The circumstances upon which we based our conclusions in the proceedings in Dockets 18875 and 79-184 have not changed significantly to date. We wish to emphasize, however, that our prior decisions do not constitute a determination under Section 214 of the Communications Act that the public convenience and necessity require a grant of the particular application before us now. Our task in deciding the present application is to determine "whether the *specific* facility chosen and the use to be made of that facility are required by the public convenience and necessity." *AT&T Co.* (TAT-7), 73 FCC 2d 248, 256 (1979) (emphasis added). To do so, we will consider the following aspects of the application:

A. Allocation of capacity among co-owners and to non-owners

B. Configuration of TAT-8 System

C. Projected demand for TAT-8 capacity

D. Availability and costs of digital circuit multiplication equipment

E. Facility loading and activation schedule

A. Allocation of Capacity Among Co-Owners and to Non-Owners

38. The application (in keeping with the CMA) proposes to assign TAT-8's capacity to the co-owners according to the allocation scheme described in paragraphs 13 to 16, *supra.* That allocation scheme raises two issues which we address below.

1. Availability of Capacity for Additional Parties or Countries

39. The first issue concerns the method by which the applicants propose to make TAT-8 capacity available to parties or countries other than those participating in the construction of the cable. The issue may arise in at least three instances: where non-carriers seek capacity; where additional U.S. carriers seek capacity; and where the applicants or other service providers seek capacity to serve countries with no ownership interest in TAT-8. Each of these instances raises differing policy concerns.

a. Non-Carriers

40. In the case of non-carriers who seek capacity, the Commission's concerns are those set forth in the Notice of Inquiry in *International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRU's in International Facilities and Assignment of Data Network Identification Codes*, CC Docket No. 83-1230, FCC 83-516, 48 Fed. Reg. 57620 (December 30, 1983). While we pointed out in that Notice that non-carrier ownership of IRU's could produce significant benefits (including possible lower rates to users, more service flexibility, alternative financing sources for carriers, and the introduction of competition for certain services), we also noted a number of possible disadvantages, such as problems in coordinating and retaining control of the underlying facilities, which are particularly complex in the international arena. We do not believe it appropriate to resolve these matters as part of our determination of this application. The issues are complex and will require a careful exercise of our judgment, informed by input from carriers, facilities owners, non-carriers who seek IRU's, end-users, and other interested persons. Since we have initiated a proceeding on this issue which we hope will prompt the production of precisely that input, we will not resolve the issue here.[17] However, in light of the significance of this issue, and given the fact that the TAT-8 cable will not be placed in service until some time after the likely conclusion of our proceeding on the IRU issue, we have decided to condition our authorization here upon compliance with the policy developed in that proceeding. No party will be prejudiced thereby and the potential rights of non-carriers will be preserved.

b. Additional Carriers

41. As we pointed out in paragraph 20, *supra*, the applicants have not proposed a specific mechanism for making capacity available to additional

[17] We note that this deferral to our proceedings in Docket 83-1230 is consistent with the Applicants' position at p. 18, n. *** of their application and with the position of Petitioner Arinc at p. 16, n. 35 of its Petition to Deny and p. 3, n. 5 of its Reply to Oppositions.

U.S. carriers who would seek capacity in TAT-8 beyond stating that the existence of capacity in excess of the co-owners' aggregate requirements will be sufficient "to enable them to accommodate reasonably the needs of any additional U.S. carriers to obtain capacity in the TAT-8 cable system." The applicants further state that the Commission's authority under Section 214 of the Communications Act over transfers of capacity "among U.S. carriers", coupled with "the reservation of the right to reallocate capacity", will permit us to enforce our future policies "concerning the *manner* in which the needs of additional U.S. carriers will be met" (emphasis added). We agree.[18] However, we are concerned not only with the manner in which additional U.S. carriers will be accommodated but with whether they will be accommodated at all. In its comments on the application, GTE Sprint states that, "without an explicit condition in the TAT-8 Section 214 authorization assuring the availability of TAT-8 IRUs, the U.S. TAT-8 co-owners would have no express obligation to make capacity available to competing carriers and the Commission may lack authority to compel the availability of IRU capacity." Comments of GTE Sprint, p. 3. GTE maintains therefore that the Commission should condition the applicants' authorization upon compliance with some ownership arrangement which ensures the availability of IRU's for additional carriers.

42. Of the responses to GTE's comments, those of ITT and NTIA specifically address this issue.[19] ITT notes that GTE suggested three possible conditions: the "AT&T ownership option" developed for the TAT-7 authorization (*AT&T Co.*, 73 FCC 2d 248, 260-61 (1979)), the circuit pool used in the TAT-6 cable authorization (*AT&T Co., et al.*, 35 FCC 2d 801, 823-24 (1972)), or a new mechanism of the Commission's choice.

43. The "AT&T ownership option" refers to a condition in the TAT-7 authorization which required AT&T to supply TAT-7 circuits on an IRU basis to non-owning carriers who seek them. The original TAT-7 proposal had been silent on this issue, proposing no mechanism for accommodating additional carriers' requests for IRU's. In response to a staff inquiry as to whether the applicants would be using a circuit pool arrangement like that used for TAT-6, AT&T volunteered to make IRU's in TAT-7 circuits available to carriers at the request of the Commission. AT&T's commitment was embodied in paragraph 43 of the TAT-7 order wherein we

[18] In a rulemaking we will initiate in the near future, we will propose policies governing the price at which IRU's will be made available to purchasers. We expect this proceeding to be completed before TAT-8 is placed in service. We expect future transfers of IRU's in TAT-8 capacity to comply with the policy developed therein and will so condition this authorization.

[19] AT&T also filed a response to GTE's comments but focused its pleading on the issue of the price which the applicants would charge carriers for IRU interests. As we stated at note 18, *supra*, this matter will be addressed in a separate proceeding.

required that AT&T "make available, at the request of the Commission, interest in TAT-7 circuits to present and future U.S. carriers . . . ." ITT maintains that the same condition should be applied to TAT-8. Furthermore, ITT urges that, as was the case for TAT-7, the condition should be applicable only to AT&T, not to the other applicants, because (1) AT&T has the lion's share of capacity; and (2) most additional carriers, like GTE, would be potential international MTS providers, and would be competing solely with AT&T. Carriers like ITT that do not provide international MTS, "should not be faced with a compulsory loss of capacity as a result of potential competition between AT&T and a third party." ITT Opposition at p. 3, n. ***.

44. ITT rejects the alternative of a circuit pool arrangement as too cumbersome and maintains that such an agreement could be impractical administratively and could deprive smaller co-owners of technological efficiences because of the unique circumstances of TAT-8. ITT also points out that no party advocates a pool arrangement nor has any party introduced into the record information on, or support for, such an arrangement.

45. NTIA also addressed this issue in its pleading. While it supports "broader IRU ownership", NTIA urges that we require IRU's to be conveyed only on a voluntary basis once a cable is placed in service. NTIA would support a condition in our authorization requiring that a limited number of IRU circuits be available on a mandatory basis before that time.

46. After considering these comments as well as the applicants' representations, we have concluded, for the reasons set forth below, that some mechanism is necessary for providing TAT-8 capacity on an IRU basis to additional carriers and that a method similar to that used for the TAT-7 cable would be most appropriate in this instance. Accordingly, we will authorize this cable on condition that the applicants make IRU interests in TAT-8 capacity available to carriers who receive authority from the Commission pursuant to Section 214 to acquire such capacity. We will also reserve the right to reallocate capacity to the extent necessary to enforce our future policies regarding the accommodation of additional carriers. This condition does not conflict with the applicants' obligations under the CMA since the CMA expressly contemplates the use of the co-owners' capacity by third parties. See § 214 Application, App. B, p. 31, ¶¶11(h) and (i).

47. We have decided to make the former condition applicable to all of the applicants. We find unpersuasive ITT's argument that the condition should apply solely to AT&T, as it did in TAT-7. We have rejected ITT's position for two reasons. First, as we noted above, the TAT-8 application states that all of the applicants, including ITT, have been allocated

capacity in excess of their requirements. Thus, AT&T is not the only applicant with excess capacity initially. Every applicant's excess capacity should be available if more efficient use can be made of it by another carrier. Second, ITT's argument in essence is that AT&T is better situated than the other applicants to give up capacity to additional carriers. It is not necessary for us to make such a determination now. We expect that, in virtually all cases, additional carriers will be able to purchase IRU's from willing sellers. The cases in which we will be called upon to compel a sale by a particular applicant will be rare. As to those instances where Commission intervention is required, by imposing a condition applicable to all applicants, our determination as to which applicant is best suited to give up capacity will be made in the context of applications by additional carriers for authority under § 214 of the Communications Act to acquire capacity in TAT-8. Under the Act, we cannot grant such authority without first determining that the requested transfer of facilities serves the public convenience and necessity both in terms of the additional carrier who seeks capacity and the carrier who gives up capacity. Thus, our condition will enable us to consider precisely those issues which ITT claims justify the application of the condition only to AT&T but our consideration will be on a case-by-case basis with specific needs, usage patterns, and carriers before us to inform our decision.

48. We agree with NTIA that IRU transfers should be voluntary; indeed, we would strongly encourage voluntary transfers of IRU interests. However, the TAT-8 system is a major new pipeline for international telecommunications in the North Atlantic region. It will be the only alternative to satellite services for end users and new carrier entrants once existing smaller cables serving the region are saturated or retired from service. Given the size of this facility, we expect it to have capacity available for some time after all other cables in the area have been saturated. To insure access to so important a facility, we will retain jurisdiction to reallocate capacity to the extent necessary to enforce our policies regarding the accommodation of additional carriers. NTIA suggests that we condition this authorization by specifying now a limited amount of capacity to be made available for IRU's to additional carriers. However, the applicants, in conjunction with the other co-owners, have already allocated all of their capacity. Rather than reallocating capacity among the applicants and making a single judgment now of the capacity necessary to meet future and as yet undeterminable needs, we prefer to reserve the right to intervene at a later date should such be necessary. This approach gives carriers an opportunity to proceed on a voluntary basis first while not foreclosing the possibility of Commission intervention later should a voluntary system break down.

c. Additional Countries

49. The final situation which raises the issue of the applicants' method for allocating capacity to non-owners is that in which the applicants or other service providers seek to serve countries in Europe, Asia or Africa with no ownership interest in TAT-8. According to the application, the co-owners have provided for this contingency by permitting BT and the French PTT to purchase capacity in TAT-8 on behalf of the non-owning countries listed in Appendix E to the application. This capacity will be conveyed to the listed countries on an IRU basis as the need arises. Countries on the list are those that have identified a need to use TAT-8 capacity. The applicants state that the listed countries have reached agreements in principle with BT and the French PTT to purchase on an IRU basis a majority of the capacity indicated.

50. This arrangement is problematic for several reasons. First, the arrangement provides no assurance that capacity will be available for service to unlisted non-owning countries. Second, no circuits wholly under U.S. control are available for providing service between a U.S. carrier and a non-owning country, listed or not. Thus, U.S. entities can exercise no structural control over the price and terms under which capacity will be made available for such service. On the other hand, this arrangement insures that U.S. carriers will pay less of the carrying costs for excess capacity since they will not be paying for both "halves" of a MAUO. Moreover, we are confident that BT and the French PTT will act in good faith in providing the dedicated capacity to listed non-owning countries in a fair and business-like manner. The application notes that there is sufficient additional capacity in TAT-8 to provide for such countries. Finally, the abundance of transatlantic circuits, both cable and satellite, which will be available in the foreseeable future reduces our concern that there will be insufficient overall capacity to meet service needs fully. In light of these factors, we find the proposed arrangement to be a reasonable attempt to avoid the problems of carrying cost allocation, circuit availability, and cumbersome procedures associated with the alternatives employed in the past. However, to assure that carriers' needs are met for capacity to individual non-owning countries, we will condition the authorization to permit us to reallocate—or require the cooperative use—among U.S. carriers of unused capacity dedicated to service to non-owning countries. We will also monitor with our foreign partners the success or failure of this scheme so that we can decide whether such arrangements should be employed in the future.

2. Allocation in Half-"Circuits"

51. In its petition to deny the application, Arinc challenges the allocation of TAT-8 capacity in half-circuits, or jointly-held MAUO's.[20] We conclude that Arinc's proposed alternative of allocating circuitry on a whole-circuit rather than a half-circuit basis requires a profound change in the ownership of international telecommunications services without a showing that the changes are efficacious or feasible. While we are not opposed to consideration and discussion of Arinc's general ideas, in, for example, one of our planning dockets, the present Section 214 application for a specific facility is not the best forum for implementing them.[21] Nevertheless, the parties here have addressed the issue in their pleadings, giving us an adequate record upon which to base a decision on the merits. Based on that record, and our experience in the international arena, as detailed below, we conclude that Arinc's proposal lacks substantive merit. We are therefore denying its petition.

52. In its petition, Arinc states that it has no objection to the technology, configuration or timing of TAT-8. In fact, it favors construction of the cable because of the potential downward pressure on rates the cable could exert. What Arinc seeks is a condition requiring the applicants to allocate ownership interests in the cable on a whole circuit basis only, meaning that co-owners would own complete MAUO'S rather than owning each jointly with a foreign co-owner. Under this arrangement, each CEPT entity would own a complete circuit terminating on North American soil and each North American carrier would own a circuit terminating in Europe. This arrangement would be coupled with a requirement that foreign entities grant non-discriminatory access to their domestic network as a condition of obtaining access to ours. Arinc argues that this

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[20] The use of the term "circuit" is somewhat anachronistic in the context of a digital, fiber optic cable. For the sake of convenience, however, we will use the term in this discussion to refer to a MAUO.

[21] We wish to emphasize that broader-based proceedings, such as the facilities planning process in Docket No. 79-184 and the North Atlantic Consultative process, are far more appropriate forums for proposing changes in the ownership of facilities on the scale proposed in Arinc's petition. The planning process was specifically created to enable participants to express their views and propose policies far enough in advance of facilities authorization to permit implementation without major disruption of the sensitive negotiated arrangements which underlie an application. The docket was initiated in 1979 and has provided numerous opportunities during the five years since for interested persons to participate in the development of guidelines and policies for the construction and use of North Atlantic transmission facilities. The consultative process provides similar opportunities for interested parties to participate as well as providing an opportunity for foreign administrations to exchange their views. We encourage interested persons to avail themselves of such opportunities. We trust that, in the future, Arinc will take advantage of these proceedings to present its views in a more timely fashion and in a more appropriate forum.

alternative ownership arrangement would introduce competition and its concomitant benefits into the international telecommunications market and would allow greater flexibility in the terms and conditions under which transatlantic cable circuitry is provided.

53. Arinc's premise is that the control over a transatlantic circuit vested in the PTT's by virtue of their one-half share permits them to prevent any extension of the Commission's pro-competitive policies to the entire circuit. The result of this "intolerable interference with the Commission's pro-competitive actions"[22] is the foreclosure of any competition in international circuits. Arinc also claims that new entrants' difficulties in obtaining operating agreements are a direct result of the half-circuit scheme.

54. Arinc claims that several benefits would flow from a whole-circuit scheme. Whole circuits would create competition between the owners on either end which would produce lower rates. Whole circuits would permit carriers to obtain access to foreign markets "merely by purchasing an IRU in a cable."[23] Both the USISC's and foreign entities would offer more flexible terms and conditions as they competed with each other for transatlantic cable traffic, unlike the current situation where foreign joint owners can negate USISC concessions by conditioning the foreign entity's half of the circuits. In support of its arguments, Arinc includes an extensive description of international relationships and negotiation methods in the commercial aviation industry and asserts that the telecommunications and air transport industries are analogous for purposes of selecting negotiating tactics.

55. In its opposition to Arinc's petition, AT&T disputes Arinc's claim that whole circuits will lead to competition in international telecommunications and open markets. AT&T claims that Arinc ignores the fact that U.S. entities cannot gain access to foreign markets simply by obtaining a whole circuit in international facilities because the U.S. entity will still need an agreement with the foreign administration to interconnect with the foreign network. As for Arinc's suggestion that the necessary concessions could be coerced by imposing reciprocal limitations on access to the U.S. network, AT&T argues that such "strong-arm tactics" fail to recognize the cooperative nature of international telecommunications. AT&T cites testimony of the Secretary of State to demonstrate the current commitment of the United States to a cooperative approach.[24]

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[22] Arinc petition at p. 17.

[23] Arinc petition at p. 21.

[24] AT&T opposition at pp. 15-17, citing *International Communications and Information Policy, 1983: Hearings Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations,* 98th Cong., 1st Sess., 6-7 (1983).

56. ITT filed an opposition in which it objects to Arinc's proposal on four grounds. First, ITT claims that the CMA would have to be renegotiated should Arinc's proposal be implemented. The delay involved in renegotiating the CMA, if it could be renegotiated at all, would disserve the public interest which the Commission, in the January Order in Docket 79-184, found would be served by timely implementation of a TAT-8 cable. Second, ITT argues that Arinc's proposal is without merit because it will not cure the problem it purports to address, namely, the reluctance of foreign telecommunications entities ("PTT's") to enter into operating agreements with U.S. carriers. "Foreign operating agreements are required because foreign administrations, which are generally monopoly [sic] government entities, insist as a matter of their own national law or policy that they participate in the provision of services to their own citizens for communications originating or terminating in their own countries." ITT opposition, at p. 8. ITT maintains that the control which a sovereign nation exercises over the telecommunications originating or terminating within its borders is not affected by changes in the point at which it exercises control, be it at a theoretical midpoint in the cable or at the cable's end. To the extent that a foreign entity's control over operating agreements creates a bottleneck, Arinc's proposal would change only its location, not the foreign entity's ability to create one.

57. Third, ITT argues that the issues raised by Arinc involve broad policy questions, beyond the scope or the record of this proceeding, which can be addressed only in a rulemaking. Finally, ITT states that Arinc had ample opportunity to propose its policy change in the Commission's planning proceeding in Docket 79-184. It failed to do so, the Commission developed its policy accordingly, and the carriers relied on the Commission's action. For the Commission to now adopt Arinc's proposal "changes the rules in the middle of the game," according to ITT, and would constitute unreasonable retroactive policymaking.

58. Hawaiian Telephone Company raises three objections to Arinc's petition in its opposition. First, HTC urges that the TAT-8 application is not the proper forum for serious consideration of Arinc's proposal given the considerable delay of the TAT-8 project which would be required to consider properly such a change in policy. Second, HTC points out that Commission acceptance of Arinc's proposal would not expedite PTT acceptance of it and would most likely make it more difficult to obtain, especially "if viewed as an effort by the U.S. to impose its policies on foreign entities." HTC petition at p. 3. Finally, like ITT and AT&T, HTC argues that Arinc's proposal would not achieve the stated objective of injecting competition into the international telecommunications market. Rather than eliminating the need for operating agreements, HTC argues

that Arinc's proposal would simply shift the point at which one is required from the cable mid-point to the cablehead.

59. In its opposition to Arinc's petition, NTIA states that Arinc's proposal will not obviate the need for operating agreements. In addition, NTIA argues that whole circuits will not encourage PTT's to admit additional U.S. carriers into their markets, since the stated reason for their reluctance to do so is the alleged additional technical and administrative requirements and associated costs involved with additional interconnections. These costs would not necessarily be changed by a switch to whole-circuit ownership. NTIA also questions whether Arinc's suggestion that PTT adoption of pro-competitive policies can be coerced through reciprocity arrangements is realistic or in this country's best interest.

60. In response to the oppositions, Arinc claims that none of them questioned its premise that whole circuits would encourage greater competition in international telecommunications. Arinc reiterates that whole circuits plus negotiated non-discriminatory access to foreign networks would allow intramodal competition and that new carriers would need only to purchase IRU's "to be assured of a complete circuit from the U.S. to foreign shores." Arinc rejects claims that adoption of its proposal would cause delay in the TAT-8 effort by arguing that only minimal changes in the CMA are required. Arinc characterizes its pleading as a request to the Commission and the State Department to use "diplomatic process' to effect its proposal. As for objections to the timing of its proposal, Arinc emphasizes that we can authorize the cable without delay subject to a condition that the whole circuit plan be adopted or that the applicants comply with any policy we may develop on the issue.

61. Arinc filed a separate reply to NTIA's pleading in which Arinc stated that NTIA's position as set forth in its pleading was inconsistent with policy statements previously made by that agency. Arinc reiterates its support for negotiation of foreign agreement with a whole-circuit policy and maintains that NTIA's fears of foreign opposition to whole-circuits can only be speculative at this point. Emphasizing the reciprocity requirement in its proposal, Arinc disputes NTIA's claim that foreign administrations who are reluctant to interconnect with additional carriers would not be prone to do so on a whole circuit basis. Finally, Arinc urges that we should give its proposal a try since, even if it fails to produce additional competition, no harm would result to the public or any party.

62. After reviewing the various pleadings, we are persuaded that adoption of Arinc's proposal at this time will not serve the public interest. We find no reason to conclude that whole circuits alone can produce the competitive benefits Arinc seeks or avoid any of the disadvantages of half-circuits. The power exercised by each PTT results from its sovereign authority over the telecommunications system within its own borders.

This authority would exist regardless of the ownership method for international circuits and regardless of the point (mid-cable or cablehead) at which ownership begins. Without a foreign correspondent's agreement to permit a cable to land and to access its domestic network, a switch to whole circuits would serve no pro-competitive purpose. To require that TAT-8 capacity be made available solely by whole circuits would do nothing more than to shift the point of interconnection, and thereby shift the locus of the foreign correspondent's exercise of its sovereign authority, from a theoretical midpoint in the Atlantic to the cablehead where the transatlantic cable lands. Thus, under a whole-circuit scheme, the PTT's would still be able to require operating agreements, to limit the number of carriers granted access to the PTT's network, or to impose other conditions upon the USISC.

63. It is the second half of Arinc's equation that is crucial to securing the alleged benefits of a whole-circuit scheme — namely, Arinc's suggestion that PTT's be required to grant access to whole-circuit owners as a condition for foreign access to the U.S. network.[25] Without such a requirement, no change would necessarily result from a whole-circuit approach. We agree with the oppositions to the petition which point out that such an approach is inconsistent with our practice of the past thirty years which has been to approach international telecommunications as a cooperative venture between sovereign nations. Arinc has provided us with no justification for unilaterally abandoning our cooperative approach in this instance. In addition, Arinc makes no showing that the PTT's have ever considered or would agree to unilateral demands for a whole circuit approach or that such an approach would be workable — that is, that the PTT's would agree to more liberal entry policies as a result — while the oppositions point out that such pressure might produce the opposite effect. Arinc in effect is asking us to initiate a radical and antagonistic change in our international communications policy on the basis of a record which indicates that no benefits would necessarily enure to the public. In light of the delay and disruption to TAT-8 that adoption of Arinc's proposal would cause, and the, at best, dubious possibility that it would produce any benefits, we deny Arinc's petition.[26]

B. Configuration of TAT-8 System

64. As noted above, the application proposes a cable with one landing point in the U.S. and two in Europe, or a "single-bident." At the time of the *January Order*, summarized in paragraphs 30-32, *supra*, the co-

[25] Arinc petition at pp. 28 and 30.

[26] We do not mean to suggest by our denial of Arinc's petition that we have rejected irrevocably the approach it proposes. On the contrary, we believe the idea of whole circuits and reciprocal access is worth pursuing further but in a more appropriate forum. See note 21, *supra*.

owners had not yet selected the single-bident configuration but were considering five possible alternatives.[27] Each configuration presented differing options as to cost and ability to meet the volume and distribution requirements of forecasted traffic. Information regarding the five possible configurations was provided to the Commission as part of AT&T's submissions in Docket 79-184. Using the single-bident configuration as a baseline, those submissions indicated that the costs for the other four alternatives exceeded that for the single-bident by a range of 25-53%.

65. Of the five alternative configurations, the co-owners narrowed the serious candidates to two: the single-bident and the single-trident. The single-trident appeared particularly promising to U.S. participants since it would have added a third European branch, landing at Estepona, Spain. The advantages of such a third leg are several. It would provide a direct transmission path for traffic going to Mediterranean Basin countries that presently must transit France or other European countries. By reducing the need for such transiting, the third leg could significantly reduce costs and could increase service reliability. In addition, a third leg would provide

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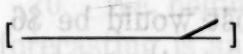
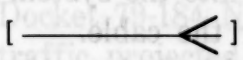
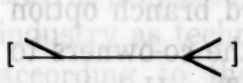
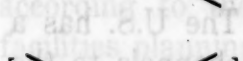
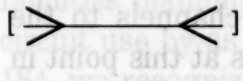
[27] Those configurations were the single-bident, a single-trident (adding a landing point in Spain), a double-trident (adding a landing point in Canada), a trident-trident (adding a second landing point in the U.S.) and a trident-bident (eliminating the landing point in Spain). AT&T submitted bids for construction of all five alternatives as follows:

Schematic	*Configuration*	*$ (millions)*
	Single-bident	312.8
	Single-trident (Spain landing point)	367.4
	double-trident (adding Canada landing point)	404.4
	trident-trident (adding U.S. landing point)	449.7
	trident-bident (dropping Spain landing point)	380.5

These bids were the lowest of those submitted. However, during the bid selection process, several co-owners raised the issue of national content, preferring to compromise price for participation by their domestic industries. The co-owners final decision was to award three contracts to three different firms for construction of the three subsegments of the cable. (See paragraphs 5 — 11, *supra*.) As a result, the actual system cost was raised from $312.8 million as bid by AT&T to $335.4 million, excluding interest during construction. We note the contrast between this approach and that taken by the U.S. towards the ANZCAN cable in which the U.S., despite being a heavy user of the ANZCAN system which has a landing point in Hawaii, did not demand participation in the cable construction effort. The U.S. position was based on our understanding that the winning bid of STC was the lowest and therefore preferable.

a relatively cheap transmission path. Finally, it could stimulate the development of digital networks in the mediterranean Basin by making international digital capacity available.

66. The co-owners rejected the single-trident option. The applicants state that this decision was based on a determination that no digital submarine cable network acceptable to the TAT-8 co-owners would be available in the Mediterranean Basin in the near future which could be connected to TAT-8 at the Spanish landing point. The applicants emphasize that administrations in the Mediterranean made every effort to obtain agreements and commitments "as to the participation, pricing and timely availability of such a connecting digital submarine cable network acceptable to the TAT-8 co-owners"[28] but were unable to develop such agreements by the time the co-owners made their selection of TAT-8's configuration. The lack of such agreements also prevented the co-owners from making a "final, detailed analysis of the pros and cons of the single-trident configuration."[29]

67. While the co-owners selected the single-bident configuration, they were mindful of the potential benefits of a third branch. Rather than foreclose that option, the CMA includes a provision which would permit modification of TAT-8 at a later date to add a branch landing in Spain, subject to the agreement of all parties to the CMA. The provision provides that such an agreement may not be unreasonably withheld "by a party provided that his interest in this Agreement suffered no prejudice by such a change in configuration."[30] Should this option be exercised within one year after TAT-8 is placed in service, the estimated cost would be $6 million more than the cost of building the third branch into the system initially plus the costs of three days of down time for the cable.

68. We have concluded that preservation of the third branch option best serves the public interest at this time. We expect the co-owners to continue to consider the third branch a viable option. The U.S. has a strong national interest in direct, secure transmission channels to the Mediterranean Basin countries. The third branch presents at this point in time the least costly method of vindicating that interest. We take seriously the language in paragraph 19 of the CMA which provides that no party would unreasonably withhold agreement to add a third leg at some later date. While we acknowledge the proviso that no party suffer prejudice by reason of a change in configuration, we emphasize that we would be gravely concerned if the proviso were to be used to deny to the U.S. the direct circuitry to Mediterranean Basin countries in which it has so strong a national interest. In light of the uncertainty surrounding the

[28] Application at p. 13, ¶10.

[29] *Id.* at n. *.

[30] Application, Appendix B [CMA], ¶ 19.

time by which there will be sufficient digital capacity in the Mediterranean Basin to justify a third branch, we do not believe that the single-trident configuration must be constructed initially. Therefore, we will require at this time only that the applicants insure that any effort or equipment required to permit later addition of a third branch be provided at the time of initial construction. We expect that the issue of a third branch will remain the subject of discussion in the North Atlantic Consultative Process.

C. Projected Demand for TAT-8 Capacity

69. In its comments regarding the need for a facilities use plan, Comsat has questioned whether current demand projections justify placing the TAT-8 cable in service in 1988 as the applicants propose. As part of the facilities planning process, we have received projections of the traffic volume anticipated by service providers (both cable and satellite) during the first seven years that TAT-8 will be in operation (from 1988 to 1995). These projections indicate that capacity will substantially exceed demand during this period and that even the most optimistic demand forecasts could be met without introducing TAT-8's capacity until 1992. If projected demand were the only justification for the introduction of this particular facility, we would have difficulty approving the 1988 introduction date for TAT-8. However, after analyzing the traffic forecasts in light of the factors discussed below, we conclude that TAT-8 should nevertheless be placed in service during the time frame proposed by the applicants.

70. We begin our analysis by emphasizing that long-range traffic forecasting is an inherently uncertain undertaking. As we stated in our Docket 79-184 NPRM (see paragraphs 26-29, *supra*), predictions as to traffic, projected costs, and system capacities are especially difficult in an industry as technologically volatile as telecommunications. For example, according to the staff's calculations, forecasts in the Docket 18875 facilities planning proceeding for end of year 1983 deviated from actual circuit use by as much at 17%. In the 1981 *January Order* in Docket 79-184, we recognized the uncertainty inherent in long-range forecasts and concluded that the public interest would be served by introduction of a fiber optic, digital cable as early as 1988 despite the fact that the traffic projections then before us indicated that, if TAT-8 were introduced as late as 1990, capacity could still exceed demand by as much as 20%.

71. In the NPRM, we reviewed traffic forecasts developed by the USISC's, NTIA, CEPT, Teleglobe, and the Commission Staff. The differences between the USISC, CEPT, and Teleglobe plans were so small that we treated them as a common forecast. By 1988, the USISC's projected a need for 37,000 circuits in the North Atlantic Region to meet projected demand. NTIA's forecast set the level in 1988 at about 33,000 circuits. At the same time, the staff's facilities plan estimated capacity in

that year to be approximately 50,000. If TAT-8's probable multiplexed capacity were to be included, capacity in 1988 would total nearly 80,000 circuits or from 43,000 to 47,000 circuits in excess of projected demand.

72. The USISC's forecast was updated in September 1983 in a joint AT&T/Comsat submission for use by the North Atlantic Consultative Working Group meeting in January of 1984. The applicants have included that submission as Appendix H to the application. The submission forecasts traffic through 1995 and compares the updated forecast with previous projections. The updated forecast projects a need for fewer circuits than that projected in 1980. The update forecasts demand for 19,516 circuits in 1985 and 45,190 in 1990 compared with the 1980 projections for the same years of 23,461 and 50,152, respectively. The update did not break out separately figures for 1988. CEPT updated its projected facility requirement in January, 1984. The CEPT forecast differs somewhat from the USISC's forecast. CEPT projects a need for 20,861 circuits in 1986 between the U.S. and CEPT countries (no figure is given for 1985) and 37,559 in 1990.

73. Capacity in existing facilities for the same years exceeds these projections. Based on the known capacity of existing and authorized facilities serving the North Atlantic region, the staff estimates that total existing capacity in 1985 will be approximately 44,000 circuits and that in 1988, absent TAT-8 and with the introduction of the high capacity INTELSAT VI series of satellites, total capacity will be approximately 60,000 circuits.[31] The year by which the forecasted demand will exceed the capacity available without TAT-8 is 1992.

74. While these numbers by themselves would favor a later introduction date for TAT-8, there are several countervailing considerations. The demand flexibility analysis contained in the Docket 79-184 *January Order* indicated that a later introduction date for TAT-8 was tenable only if the Intelsat VI satellite series is operational on schedule and is utilizing advanced modulation techniques on both frequency bands. These technologies are still in the developmental stage. Moreover, they will require a separate development effort for ground equipment and a significant purchase commitment by several countries. These factors present a risk of some delay in utilizing advanced modulation techniques on the planned dates of operation for the satellites. Such a delay would result in a lack of sufficient capacity to meet demand in 1988 if TAT-8 is delayed. This risk is aggravated by the fact that the Intelsat VI program and TAT-8's fiber optic digital technology are both introducing development risks simulta-

[31] The staff arrived at these estimates by adding up the total capacity of cables and satellites that will still be in service in those years plus the capacity of facilities that have already been authorized for introduction by that time.

neously and by the historical experience of delays in the Intelsat V and VA programs.

75. In addition to the uncertainties inherent in long-range traffic projections and the technological development risks outlined above, we have several concerns which also run counter to the results of the demand projections. First, introduction of TAT-8 will mean the introduction of digital fiber optic technology with its attendant service benefits (see footnote 6, *supra*). Besides providing improved service characteristics, TAT-8's digital technology will provide an important interconnection between the various developing domestic digital networks in the countries linked by TAT-8. By accommodating new services, we believe this international digital capability will spur the development of domestic digital systems. The development of, and demand for, new digitalized services could very well stimulate circuit demand beyond that projected in our traffic forecasts. Moreover, the lower circuit costs of TAT-8 should exert a beneficial downward pressure on the rates for international circuitry. In addition, TAT-8's fiber optic technology can transmit video and other broadband services now available efficiently only over satellite. By making video services available with more efficient transmission technologies, TAT-8 may stimulate the development of international broadband services. Finally, a delay in the introduction date for the cable would require the co-owners to rebid the project and scrap the current arrangements under which U.S. firms' participation totals some 75% of the cost. After weighing these benefits against the arguments for delaying the cable until projected demand would require it, we conclude that the benefits of introducing the cable in 1988 outweigh the comparatively speculative benefits of delay.

D. Availability and Costs of Digital Circuit Multiplication Equipment

76. As we noted above, the use of TAT-8 to connect two differing digital hierarchies has required the use of new equipment to implement the interworking arrangement. In addition, the digital nature of TAT-8 has required the development of new circuit multiplication technology for voice services. At this stage in the development of the interworking equipment and the circuit multiplication technology, the applicants have no final cost information for the DCME and multiplex system conversion equipment which they will be using for TAT-8. They have estimated costs to be $75,000 per DCME terminal and $3,000 per 2 Mbps terminal for the multiplex equipment. They estimate that these costs will result in an additional cost of approximately $500 per derived voice grade half-circuit.

77. There remain many unknowns in addition to the lack of final cost data. The applicants have not yet determined the exact methodology by which the transmissions of system users will be combined into the format

required by the 140 Mbps digital input/output ports. No mention is made in the application of the method by which the applicants will make DCME and other multiplexing services or equipment available to users. Thus, we have no information as to how the equipment will be made available to the applicants and other carriers and who will provide such technology. The application does not indicate whether the applicants would oppose making the technology available to carriers who might wish to perform their own compression, conversion, and multiplexing to provide a bit stream compatible with the 140 Mbps ports. Alternatively, carriers might wish to take a multiplexed stream directly from the 140 Mbps input/output points at the Tuckerton cablehead and perform their own digital hierarchy conversion, de-compression, and de-multiplexing. The information currently available does not permit us to determine whether DCME, multiplexing, and interworking functions should necessarily be provided only on a "bundled" basis if it is technically feasible to unbundle them and permit users the choice of supplying their own.

78. Much of the uncertainty can only be resolved when AT&T completes its research and development effort for the technology and equipment involved. Accordingly, we will require AT&T to keep us apprised of their technical progress in this area. We will reserve the right to 1) review the attribution of DCME, multiplexing, and interworking costs as well as the terms and conditions of their use once current uncertainties as to costs and availability have been resolved, and 2) require such changes in the offering of these services and equipment as may become necessary.[32]

E. Facility Loading and Activation Schedule

79. Comsat objects to the lack of an activation schedule for the capacity in the TAT-8 system and the absence of a facility loading policy applicable to facilities placed in service after the expiration of the current 1975-1985 planning period. Comsat claims to reject the applicants' position that, since "[f]acility loading principles for the North Atlantic, including TAT-8, will be the subject of the Commission's ongoing CC Docket No. 79-184 and the North Atlantic Consultative Process"[33], the Commission need

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[32] Based on the information provided to us in the application, it does not appear that the interworking arrangement or the equipment to be developed to implement it will effect changes in the code or format of the information transmitted so we do not believe that it will trigger the restrictions developed in the "Computer II" inquiry, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) ("Final Decision"), *on reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983). To the extent that any waiver of our Computer II rules would be necessary to permit the applicants to provide the DCME and related services or equipment, however, we hereby grant such a waiver.

[33] Application at p. 26.

only condition this authorization upon compliance with the outcome of those proceedings. Comsat observes that, previously, the loading policy and activation schedule for a given facility would be developed through the facilities planning process before or concurrently with Commission consideration of the § 214 application for the facility and that such is not the case for this facility. Therefore, Comsat is concerned that the market power of the co-owners, particularly AT&T, which enables them to determine the relative loading of satellites and cables, and their incentive to prefer cable which is fostered by their investment interests, will work to Comsat's disadvantage absent a facilities use plan for the 1985-1995 period. Thus although Comsat purports to reject the applicants' position favoring a condition requiring compliance with the facility loading policy developed in the future by the Commission, Comsat concludes by requesting that the Commission reaffirm a commitment to the development of a facilities use plan for the 1985-1995 period and condition our grant of authority upon the outcome of that effort.[34]

80. In their replies to Comsat's comments, AT&T, NTIA, and ITT agreed with Comsat's request that any grant of authority be conditioned upon compliance with the facilities use policies developed in our Docket 79-184 proceeding and the North Atlantic Consultative Process. AT&T and ITT also pointed out that the applicants themselves had requested the same action in their application. NTIA urged that we not delay approval of the application pending development of a use plan.

81. We perceive no substantial difference in the positions of the parties. As to a comprehensive facilities use and circuit activation plan, we expect the consultative process and our Docket 79-184 to produce a use plan addressing a variety of facility use issues, before TAT-8 is placed in service. As for Comsat's concern that we develop a facility loading policy, we will have completed a rulemaking on the policy to be applied in the future before the expiration of the current facility loading policy. We will condition our grant of authority upon compliance with such policies as we may develop in those proceedings.[35]

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[34] The current loading policy is a "balanced loading" policy under which circuits are distributed among satellite and cable facilities in a manner which results in non-saturated facilities carrying equal numbers of circuits. See Policies for Overseas Common Carriers, 82 FCC 2d 407, 431, n. 18 (1980). The policy was developed in the Docket 18875 planning proceedings in conjunction with negotiations between the U.S. and the PTT's. The policy expires by its own terms at year-end 1985.

[35] Our loading policy is continuing to evolve as the international telecommunications environment moves towards a more competitive structure. We have stated on many previous occasions our intention in the future to remove the Commission from the task of allocating traffic between cables and satellites and to give greater discretion to carriers in their facilities-use decisions. See, e.g., our decision in *American Telephone and Telegraph Company*, FCC File Nos. I-P-C-83-043, *et al.*, Mimeo No. 33719, released August 26, 1983. While we prefer to rely upon competition between the two mediums, we

82. We also grant the applicants' request that we authorize by this order activation of TAT-8 capacity in conformance with the policies we develop in Docket 79-184 and any other pertinent Commission proceedings so that a second application seeking authorization to activate circuits will not be necessary. No public interest would be served by requiring such separate paperwork. Should the timing of these various events fail to coincide, we will revisit this area and address the issues specifically in the context of this application when it becomes necessary to do so.

IV. Miscellaneous Considerations

83. TAT-8 presents new and unique problems of restoration because it is capable of handling traffic of unprecedented magnitude. Possible failures of either working fiber pair are not as great a problem since traffic can be switched to the third spare pair between repeaters. Restoration becomes problematic if the entire cable should fail. No existing cable facility could carry the traffic TAT-8 is capable of carrying when full. Restoration of the entire cable would require most, if not all, of the capacity of the Intelsat VI Atlantic Ocean Region in-orbit-spare satellite. However, Intelsat is considering making such capacity available only on a preemptible basis with a relatively high, fixed, annual charge. Further, Intelsat currently prefers to charge on a full or half transponder, rather than a voice circuit, basis.

84. The applicants have proposed certain measures (armoring and burying the cable) to protect against damage to the cable from outside forces. Nevertheless, the risks of implementing any new technology, certainly present for the TAT-8 system, raise the possibility of cable failure. The staff plans to address these issues in both the North Atlantic Consultative process and in a rulemaking proceeding which will result in the issuance of facilities planning guidelines for the time period in which TAT-8 will be placed in service. As a result of these proceedings, the difficulties of insuring adequate restoration of TAT-8 should be minimized.

85. Grant of this application will not constitute a major action within the meaning of Section 1.1305 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1976). See *Report and Order*, 49 FCC 2d 1313, 1320 (1974) (laying of submarine cable and installation of additional cable over existing routes not "major action"). Consequently, no environmental information is required as part of the application.

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recognize that such competition does not yet exist. We intend to monitor the situation to assure an equitable transition to a competitive environment.

V. Conclusion

86. In view of the foregoing, we herein find that the public interest will be served by a grant of the U.S. carriers' application for a TAT-8 cable. We authorize the applicants to activate MAUO's in TAT-8 in accordance with such comprehensive facilities plan as is developed in the North Atlantic Consultative process and the North Atlantic facilities planning proceeding in Docket 79-184.

Order and Certificate

87. IT IS HEREBY CERTIFIED, that the present and future public interest, convenience and necessity require the construction and operation of the TAT-8 cable system described in application I-T-C-84-072. IT IS ORDERED that the application be GRANTED, subject to the following terms, conditions, and limitations. The applicants are authorized to:

(1) acquire on an ownership basis the half-interests in TAT-8 MAUO's, indicated in Appendix B, Schedule C of the application and appended hereto as Appendix B to this order, and use same for the provision of regularly authorized services between the United States and the indicated countries and beyond;

(2) activate that capacity in accordance with the comprehensive facilities construction and use plan to be developed in the Commission's Docket 79-184 and the facilities loading policies then in effect;

(3) subdivide the MAUO's authorized herein in accordance with any Commission orders authorizing applicants to utilize digital circuit multiplication equipment to derive additional voice paths from authorized capacity;

(4) lease interests in, and operate, necessary domestic connecting circuits between the Tuckerton, New Jersey cable terminal and points of service in the U.S.;

(5) lease interests in or acquire by IRU, and operate, necessary connecting circuits between the TAT-8 terminals located in the United Kingdom and France and the borders of the countries specified in paragraph (1) above.

88. IT IS FURTHER ORDERED, that the petition to deny the application herein, filed by Aeronautical Radio, Inc. is DENIED.

89. IT IS FURTHER ORDERED, that when a given applicant seeks to acquire or transfer an ownership or IRU interest in TAT-8 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro rated accumulated cost of such circuit if the system is not then operational) or in conformance with such policy as the Commission may develop in the future regarding the price at which IRU's will be made available.

90. IT IS FURTHER ORDERED, that the applicants make available half-interests in TAT-8 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

91. IT IS FURTHER ORDERED, that the applicants shall make capacity in the TAT-8 system available to non-carriers in conformance with the policies developed in the Commission's CC Docket 83-1230.

92. IT IS FURTHER ORDERED, that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the applicants' ownership, management, maintenance, and operation of this cable as authorized herein, to assure the most efficient use not only of this cable but of all means of communications between the U.S. and Europe.

93. IT IS FURTHER ORDERED, that the applicants shall ensure that any construction effort or equipment now required to permit later addition of a third branch be provided or installed at the time of initial construction.

94. IT IS FURTHER ORDERED, that the Commission retain jurisdiction to review the DCME, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

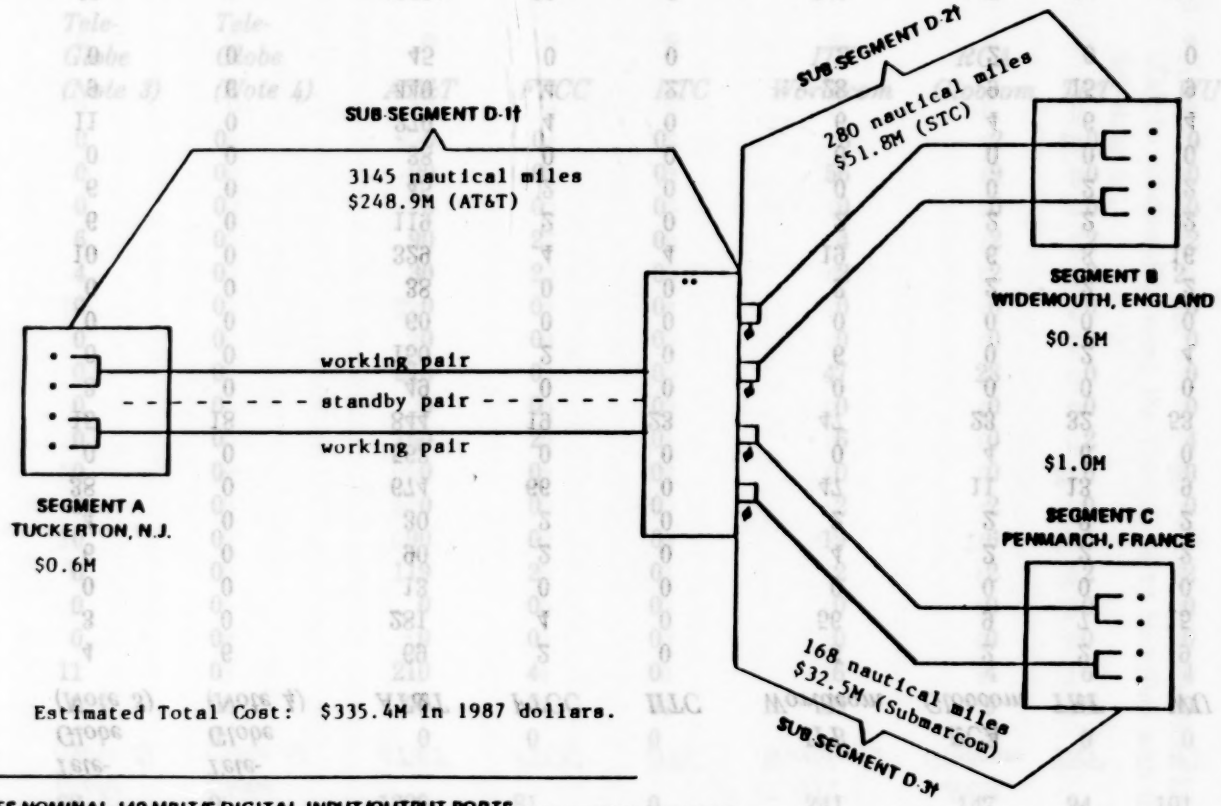
95. IT IS FURTHER ORDERED, that no applicant herein shall dispose of any interest in any TAT-8 capacity it is authorized to acquire in any way without prior authorization by the Commission.

96. IT IS FURTHER ORDERED, that the applicants shall include TAT-8 facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

97. IT IS FURTHER ORDERED, that this authorization is issued subject to the terms and conditions of any license issued to the applicants herein under the act entitiled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SCHEMATIC DIAGRAM AND ROUTE SKETCH OF THE TAT 8 CABLE SYSTEM



Estimated Total Cost: $335.4M in 1987 dollars.

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* DENOTES NOMINAL 140 MBIT/S DIGITAL INPUT/OUTPUT PORTS.

** BRANCHING UNIT

† SUB SEGMENTS D-1, D-2 AND D-3 EACH INCLUDE THE NOMINAL 140 MBIT/S DIGITAL INPUT/OUTPUT PORTS AT THEIR RESPECTIVE CABLE LANDING POINTS.

♦ DENOTES INTERCONNECTION DEVICE BETWEEN AT&T PROVIDED SL CABLE DESIGN (SUB-SEGMENT D-1), STC PROVIDED NL-2 CABLE DESIGN (SUB SEGMENT D 2) AND SUBMARCOM PROVIDED S280 CABLE DESIGN (SUB SEGMENT D 3).

APPENDIX B

Assignment Of Minimum Assignable Units Of Ownership (MAUDO) In The TAT-8 Cable System

MAUDO Assigned For Joint Use By Parties To This Agreement In Segment D

Western Parties

Eastern Parties	*Tele-Globe (Note 3)*	*Tele-Globe (Note 4)*	*AT&T*	*FTCC*	*IITC*	*ITT Worldcom*	*RCA Globcom*	*TRT*	*WU*	*WUI*	*Total*
Austria	4	6	69	2	0	6	2	2	9	9	109
Belgium	3	0	281	4	0	56	9	7	15	20	395
Cyprus	0	0	13	0	0	0	0	0	0	0	13
Denmark	6	0	90	2	0	4	2	2	2	2	110
Finland	4	0	30	2	0	2	2	2	2	2	46
France (Note 1)	38	0	674	66	0	47	11	13	9	26	884
France (Note 2)	0	0	563	0	0	0	4	6	0	17	590
Germany	15	18	844	19	23	47	23	32	53	32	1106
Greece	3	0	49	0	0	0	0	0	0	0	52
Ireland	0	0	150	2	0	6	0	2	4	6	170
Italy	0	0	60	0	0	0	0	0	0	0	60
Luxemburg	0	0	38	0	0	2	2	2	2	4	50
Netherlands	10	0	329	4	4	19	6	8	16	18	414
Norway	6	0	119	2	0	2	2	2	2	2	137
Portugal	6	0	45	2	0	0	0	2	2	2	59
Spain	0	0	38	0	0	0	0	0	0	0	38
Sweden	11	0	270	4	0	6	4	6	4	6	311
Switzerland	9	6	440	4	2	28	9	15	9	21	543
Turkey	0	0	45	0	0	2	2	0	0	2	51
United Kingdom (Note 1)	60	0	1329	81	0	241	147	94	101	290	2343
United Kingdom (Note 2)	0	0	0	0	0	0	2	0	0	0	2
Yugoslavia	0	0	71	0	0	0	0	0	2	4	77
Total	175	30	5547	194	29	468	227	195	232	463	7560

Total	175	30	5547	194	29	468	227	193	252	463	7560

Assignment Of Minimum Assignable Units Of Ownership (MAUDO) In The TAT-8 Cable System

MAUDO Assigned For Joint Use By Parties To This Agreement Between Tuckerton And Widemouth

Eastern Parties	*Tele-Globe (Note 3)*	*Tele-Globe (Note 4)*	*AT&T*	*FTCC*	*IITC*	*ITT Worldcom*	*RCA Globcom*	*TRT*	*WU*	*WUI*	*Total*
	Western Parties										
Austria	0	0	0	0	0	6	2	0	0	0	8
Belgium	0	0	90	0	0	56	9	0	0	11	166
Cyprus	0	0	0	0	0	0	0	0	0	0	0
Denmark	6	0	90	2	0	4	2	2	2	2	110
Finland	4	0	30	2	0	2	2	2	2	2	46
France (Note 1)	0	0	0	0	0	0	0	0	0	0	0
France (Note 2)	0	0	0	0	0	0	0	0	0	0	0
Germany	0	0	210	0	0	47	23	0	0	6	286
Greece	0	0	0	0	0	0	0	0	0	0	0
Ireland	0	0	150	2	0	6	0	2	4	6	170
Italy	0	0	0	0	0	0	0	0	0	0	0
Luxemburg	0	0	0	0	0	2	2	0	0	0	4
Netherlands	0	0	90	0	0	19	6	0	5	6	126
Norway	6	0	119	2	0	2	2	2	2	2	137
Portugal	0	0	0	0	0	0	0	0	0	0	0
Spain	0	0	0	0	0	0	0	0	0	0	0
Sweden	11	0	210	4	0	6	4	6	4	6	251
Switzerland	0	0	90	0	0	28	9	0	0	0	127
Turkey	0	0	0	0	0	2	2	0	0	0	4
United Kingdom (Note 1)	60	0	1329	81	0	241	147	94	101	290	2343
United Kingdom (Note 2)	0	0	0	0	0	0	2	0	0	0	2
Yugoslavia	0	0	0	0	0	0	0	0	0	0	0
Total	87	0	2408	93	0	421	212	108	120	331	3780

Assignment Of Minimum Assignable Units Of Ownership (MAUDO) In The TAT-8 Cable System

MAUDO Assigned For Joint Use By Parties To This Agreement Between Tuckerton And Penmarch

Western Parties

Eastern Parties	*Tele-Globe (Note 3)*	*Tele-Globe (Note 4)*	*AT&T*	*FTCC*	*IITC*	*ITT Worldcom*	*RCA Globcom*	*TRT*	*WU*	*WUI*	*Total*
Austria	4	6	69	2	0	0	0	2	9	9	101
Belgium	3	0	191	4	0	0	0	7	15	9	229
Cyprus	0	0	13	0	0	0	0	0	0	0	13
Denmark	0	0	0	0	0	0	0	0	0	0	0
Finland	0	0	0	0	0	0	0	0	0	0	0
France (Note 1)	38	0	674	66	0	47	11	13	9	26	884
France (Note 2)	0	0	563	0	0	0	4	6	0	17	590
Germany	15	18	634	19	23	0	0	32	53	26	820
Greece	3	0	49	0	0	0	0	0	0	0	52
Ireland	0	0	0	0	0	0	0	0	0	0	0
Italy	0	0	60	0	0	0	0	0	0	0	60
Luxemburg	0	0	38	0	0	0	0	2	2	4	46
Netherlands	10	0	239	4	4	0	0	8	11	12	288
Norway	0	0	0	0	0	0	0	0	0	0	0
Portugal	6	0	45	2	0	0	0	2	2	2	59
Spain	0	0	38	0	0	0	0	0	0	0	38
Sweden	0	0	60	0	0	0	0	0	0	0	60
Switzerland	9	6	350	4	2	0	0	15	9	21	416
Turkey	0	0	45	0	0	0	0	0	0	2	47
United Kingdom (Note 1)	0	0	0	0	0	0	0	0	0	0	0
United Kingdom (Note 2)	0	0	0	0	0	0	0	0	0	0	0
Yugoslavia	0	0	71	0	0	0	0	0	2	4	77
Total	88	30	3139	101	29	47	15	87	112	132	3780

Notes for Schedules C

NOTE 1 Intended for use between the Eastern party and the indicated Western party.

NOTE 2 Intended for use between entities not parties to this agreement and the indicated Western party.

NOTE 3 Intended for use between Teleglobe and the indicated Eastern party.

NOTE 4 Intended for use between entities not parties to this agreement and the indicated Eastern party.

NOTE 5 For the purposes of this schedule each country listed under "Eastern Parties" shall be construed to mean the Eastern party identified with that country in Schedule A.

Common Carrier, Authorization
Competition, Common Carriers

Report and Order adopted regarding proposal to allow AT&T Information Systems to provide basic, resold services.
—*AT&T Co.*
CC Docket No. 83-1375

FCC 84-289

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Co.: Provision of Basic Services Via Resale by Separate Subsidiary	CC Docket No. 83-1375

REPORT AND ORDER

Adopted June 27, 1984; Released: July 11, 1984

BY THE COMMISSION:

I. Introduction

1. The Notice of Proposed Rulemaking in this proceeding[1] (*Notice*) proposed to allow American Telephone and Telegraph Co. (AT&T) to provide basic services via resale through its separate subsidiary formed pursuant to the *Second Computer Inquiry*.[2] That subsidiary is currently called AT&T Information Systems (ATTIS). All of AT&T's offerings of customer-premises equipment (CPE) to end users and enhanced services are through ATTIS. In the *Second Computer Inquiry*, we barred that subsidiary from owning transmission facilities or providing common carrier (basic) services. The *Notice* sought information with which we could evaluate the costs and benefits of lifting the prohibition on ATTIS

[1] 49 Fed. Reg. 1248 (January 10, 1984).

[2] 77 FCC 2d 384, 474, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2107 (1983). The decision to bar the separate subsidiary from providing basic transmission services cited concerns about cost shifting from nonregulated to regulated activities. 77 FCC 2d at 474.

providing basic services via resale[3] of some or any services of common carriers.

2. The *Notice* responded, in part, to a January 1983 letter from AT&T in which it sought authorization for its regulated interexchange carrier, AT&T Communications (ATCOM), to provide receive-only earth stations performing certain functions. We found that these earth stations are CPE and that AT&T's request did not satisfy the standards for us to grant a waiver of the *Second Computer Inquiry*.[4] As a separate matter, AT&T filed a petition in February 1984 seeking waiver of the *Second Computer Inquiry* restrictions on ATTIS so that it could offer both CPE and basic services via resale to multi-tenant commercial buildings and complexes, *i.e.*, participate in the "telecommunications-enhanced real estate (intelligent building) marketplace."[5] We consolidate that petition with this proceeding. There were two other related requests by AT&T. In September 1982, AT&T filed a petition requesting forbearance from regulating ATTIS' basic, resold services in response to our decision in the *Competitive Carrier Rulemaking* to forbear regulating various resellers.[6] Recently, AT&T filed a petition to eliminate the structural separation requirements of the *Second Computer Inquiry*.[7]

3. As we will explain *infra*, three major factors have changed since the Commission decided to bar ATTIS from providing basic services via resale in 1980. First, structural separation of ATCOM's basic services from ATTIS' CPE and enhanced services has been achieved, and we have had experience with regulating ATCOM's offerings of basic services to check potential discrimination favoring ATTIS' CPE and enhanced ser-

[3] We declared common carriers' tariff restrictions on resale unlawful in Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

[4] Letter to Chief, Common Carrier Bureau from A. Green, AT&T (January 19, 1983); AT&T: Request for Clarification of Computer II Requirements Concerning Earth Stations, FCC 83-603 (released January 13, 1984).

[5] ATTIS Petition for Expedited Grant of a Waiver and Forbearance of Title II Regulation (February 2, 1984) (*ATTIS Petition*). We received pleadings on this petition from Allnet Communications Services, Independent Data Communications Manufacturers Association (IDCMA), Association of Long Distance Telephone Companies (ALTEL), GTE Service Corp., North American Telecommunications Association (NATA), and ROLM Corp. The latter two requested consolidation of this petition with the proceedings in this docket. We also received a letter on ATTIS' request from United Technologies Building Systems (March 21, 1984), which was responded to by ALTEL (March 29, 1984).

[6] AT&T Petition for Reconsideration in CC Docket No. 79-252 (September 27, 1982). *See* Competitive Carrier Rulemaking, 91 FCC 2d 59 (1982), *recon.*, 93 FCC 2d 54, 61 and n. 17 (1983).

[7] Petition of AT&T for Relief from Structural Separation Requirements, Docket No. 20828 (April 30, 1984) (*AT&T Petition*).

vices. Second, the number of suppliers of basic services has increased, including many resellers of ATCOM's services who can provide basic services in the same way that ATTIS would. Third, ATTIS' market power in CPE has declined with greater competition for new installations, a smaller share for ATTIS of the installed base, and the Commission's price protection program. As developments which might affect the costs and benefits flowing from a set of regulatory practices occur, we have the responsibility to evaluate the impacts of those practices, consider whether they best promote the public interest, and eliminate unnecessary regulatory burdens. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979); *Nader v. FCC*, 520 F.2d 182, 205 (D.C. Cir. 1975). The action we take today is in accord with our desire to impose only the minimum structural separation and associated restrictions necessary to address our regulatory concerns regarding cross-subsidization and anticompetitive conduct. *Second Computer Inquiry*, 77 FCC 2d at 476. We recognized in the *Second Computer Inquiry* our obligation to adjust the conditions ordered there as experience and changed circumstances warrant. *Id.* at 463.

4. The decision we reach here is based on consideration of the record developed in this proceeding,[8] in the Inquiry on *Long-Run Regulation of AT&T's Basic Domestic Interstate Services*,[9] and in connection with AT&T's September 1982, January 1983, February 1984, and April 1984 requests. We conclude that the public interest will be served by authorizing ATTIS to provide basic domestic services via resale. By this Order, ATTIS can resell the domestic, interstate services of any carrier, including any of the domestic, interstate, tariffed services of an affiliated carrier (*e.g.*, ATCOM). This authorization is subject to: two reporting require-

[8] The following parties filed comments and or reply comments in CC Docket No. 83-1375: ATTIS, National Telecommunications and Information Administration (NTIA), The Federal Executive Agencies, Public Services Commission of Wisconsin, International Business Machines Corp. (IBM), NATA, Association of Data Processing Services Organization (ADAPSO), IDCMA, International Communications Association (ICA), J.C. Penney Co., ALTEL, MCI Telecommunications Corp., GTE Service Corp., Satellite Business Systems (SBS), Telesphere Network, Inc., RCA Communications, Inc., ITT World Communications Services, Inc., Allnet Communication Services, Inc., U.S. Telephone Inc., Lexitel Corp., American Satellite Co., EMX Telecom, ISACOMM, Inc., Teltec Savings Communications Co. and Satelco Inc., TelaMarketing Communications, Inc., ROLM Corp., Tandy Corp., Southwestern Bell Corp., BellSouth Corp., and the companies of U.S. West, NYNEX, Pacific Telesis, and Bell Atlantic. Microtel and SouthernTel filed late comments.

[9] 48 Fed. Reg. 51340, 51348 (November 8, 1983). Parties commenting specifically on the issue of ATTIS resale in this proceeding are Lexitel, MCI, IDCMA, ROLM, NATA, and ABC, CBS and NBC. Comments of the U.S. Department of Justice, MCI, and others recommended a substantial reduction in the regulatory filing requirements on AT&T. Reply comments of the National Cable Television Association, GTE Service Corp., Satellite Business Systems, and others stated concerns about cost shifting, cross-subsidization, and anticompetitive conduct by AT&T.

ments on ATCOM; the restriction that ATCOM's offerings used by ATTIS be made available by ATCOM through nondiscriminatory tariffs; and the requirement that ATTIS use just, reasonable, nondiscriminatory, and unbundled offerings for its basic services. We will forbear from tariff and Section 214 regulation of ATTIS' basic, domestic, interstate, resold services. We expect that consumers will benefit from more efficiently supplied products and services, innovative offerings, and increased competition. We are confident that our regulatory controls and market forces will assure that the basic services of ATCOM and ATTIS are offered with just, reasonable, and nondiscriminatory terms and rates.

II. Anticipated Public Benefits and Costs of ATTIS Providing Basic Services Via Resale

5. The *Notice* sought to develop a record on the public benefits and costs of authorizing ATTIS to provide basic services via resale.[10] As discussed in the *Notice*, this step may enable ATTIS to improve the quality and prices of services and products available to consumers. It is a goal of the Communications Act that the people of the United States have available rapid, efficient telecommunications services at reasonable charges, 47 U.S.C. § 151. We expect that ATTIS will be able to develop innovative, efficient combinations of basic services with CPE and enhanced services through single-vendor design, installation, operation, and maintenance. Also, it is likely that ATTIS will develop innovative, efficient arrangements for sharing basic services. Furthermore, we believe that ATTIS' entry into basic services via resale will stimulate competition in a wide range of activities. On the other hand, the *Notice* expressed concern over possible discriminatory practices by ATCOM favoring ATTIS, and the possibility that ATTIS would acquire market power in basic services. We recognized that allowing ATTIS to provide basic, resold services would not necessarily increase cross-subsidies or anticompetitive leverage, and we sought comments on the likelihood that these problems would emerge and regulatory tools to combat them.

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[10] 49 Fed. Reg. at 1249-50. We do not apply the standard for waivers of the *Second Computer Inquiry*'s restrictions (Computer II Requirements Concerning Earth Stations, *supra*, at 4) to this rulemaking. Rather, we weigh the possible costs and benefits of lifting the bar on ATTIS providing basic, resold services in this rulemaking. In the *Second Computer Inquiry*, we recognized our obligation to perform this type of reevaluation of the structural separation conditions and associated restrictions based on our experience and change of circumstances. 77 FCC 2d at 463, 476. We find that changed market conditions and our experience with structural separation between ATTIS and ATCOM warrant modifying the cost-benefit analysis applied to this issue in the *Second Computer Inquiry* and adjusting the restrictions imposed on ATTIS in that proceeding. *See* para. 3 *supra*. *See also* para. 33 *infra* on why we do not authorize resale by the Bell Operating Companies' separated subsidiaries in this Order.

6. *Benefits.* AT&T's pleadings, petitions, and letter describe three types of gains from ATTIS providing basic services via resale. We find that these benefits are reasonably likely to occur.

7. First, certain consumers will benefit if ATTIS can meet their demands for an integration of CPE, enhanced services, and basic services on a single-vendor basis, *i.e.*, "one-stop shopping" and "single-system management." Single-vendor supply can reduce customers' costs of selecting optimal interconnected offerings, obtaining them, and keeping them operational.[11] We reaffirm our conclusion in the *Second Computer Inquiry* that, generally, structural separation of CPE and enhanced services from basic services does not impair innovation or create large costs.[12] In many cases, customers combine telecommunications products and services from different vendors to obtain price/quality combinations superior to single-vendor offerings. On the other hand, the examples discussed in the next paragraph support the finding that some customers can benefit from single-vendor supply of CPE, enhanced services, and basic services.

8. In analyzing the demand for "complete satellite network services," AT&T pointed to the customers' benefits from having one supplier with responsibility for determining a customer's needs; designing the optimal configuration of CPE, terrestrial and satellite transmission services, and network controllers; obtaining the necessary products and services; and installing and maintaining the system.[13] The existence of vendors of these integrated packages — most domestic satellite carriers — evidences

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[11] *See generally* Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233 (1979); O. Williamson, Markets and Hierarchies (1976). We recently recognized that consumers may benefit from having available packages of services (services with end-to-end capability) in addition to services in "building block" form. Private Line Rate Structures and Volume Discount Practices, 49 Fed. Reg. 18107, 18111-13 (April 27, 1984); AT&T: Picturephone (R) Meeting Service, 89 FCC 2d 1017, 1025 (1982). *See also* antitrust cases on benefits to consumers from allowing firms to offer their products and services by tying and packaging, *e.g.*, Jefferson Parish Hospital District No. 2 v. Hyde, 52 U.S.L.W. 4385 (March 27, 1984); Broadcast Music, Inc. v. CBS, 441 U.S.1 (1978) (aggregate sale of ostensibly separate items that serves to improve the quality of the product offered by the seller); United States Steel Corp. v. Fortner Ent., 429 U.S. 610, 612 n.1 (1979); United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[12] 77 FCC 2d at 465-66, 482. *See also* AT&T: Computer II Requirements Concerning Earth Stations, *supra.*

[13] Letter to Chief, Common Carrier Bureau from A. Green, AT&T (January 19, 1983). Comments filed in response to that letter by R. R. Donnelly and Sons Co. and the American Satellite Co. generally supported AT&T's request. We did not dispute the claimed benefits from single-vendor supply for these customers. Rather, we found that there were a number of vendors offering single-vendor supply for these customers and that the costs of allowing ATCOM to supply this CPE outweighed the benefits. AT&T: Computer II Requirements Concerning Earth Stations, *supra.*

benefits from such integrated supply for some customers. Along these lines, we recently recognized that consumers are likely to benefit from allowing International Business Machines (IBM) and Satellite Business Systems (SBS) to market their products jointly rather than requiring their customers to piece together their offerings.[14] The Federal Executive Agencies commented that their "past experiences have demonstrated that there are significant improvements in service quality and responsiveness when one supplier can bear end-to-end responsibility for a service."[15] AT&T's April 1984 petition included a portion of Caterpillar Tractor Company's Request for Proposal for a single supplier of equipment and services to meet its Peoria area telecommunications needs.[16] AT&T also cited the demand for single system providers of full-service-communications-and-building-management packages, including the new "teleport" concept.[17]

9. Of course, firms not affiliated with AT&T can supply customers with much the same type of one-stop shopping and single-system management as could ATTIS if we lifted this prohibition. These firms are now able to resell carriers' services, including those of ATCOM,[18] on the same terms as ATTIS could, and combine these services with offerings of CPE and enhanced services. Also, some suppliers that own transmission facilities can provide even more integrated offerings than ATTIS could through resale. Yet, consumers will benefit from allowing ATTIS to supply a broader range of interconnected offerings. Consumers would have ATTIS' CPE, enhanced services, and expertise available on a single-vendor basis, and are likely to benefit further from increased competition (see para. 12 *infra*). Currently, ATTIS can help its customers select and order basic services and manage an integration of CPE, basic services,

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[14] Satellite Business Systems' Petition to Modify Conditions of Authorization, ENF-83-16, at 10 (adopted May 10, 1984) ("SBS would have more flexibility to meet consumer needs, and be able to lower its marketing costs and compete more effectively with other carriers.").

[15] Comments in CC Docket No. 83-1374 of the Federal Executive Agencies at 3; NTIA at 4 ("The public can be expected to benefit from improved access to the offerings of a major telecommunications supplier."). Of course, without authority to own transmission facilities, ATTIS cannot operate as a completely integrated end-to-end system manager. Still, authorizing ATTIS to provide basic, resold services would be a substantial advance for ATTIS' customers in this direction.

[16] *AT&T Petition* at 43-44. Caterpillar's request does not state that its supplier must provide basic services via its own transmission facilities.

[17] *Id.* at 44. According to AT&T, (1) One Park Place, One South Wacher, and 333 West Wacker in Chicago, Unitedbank Plaza in Houston, and the Galleria in Dallas employ complete shared services packages; (2) at least nine teleports are under construction; and (3) suppliers include United Business Communications, Inc., Lincom Corp., TEL-Management Corp., CP National, and SBS Realcom.

[18] Our regulatory controls to promote nondiscriminatory use of ATCOM's services are described in the next section.

and enhanced services. But, allowing ATTIS to resell basic services would increase its ability to offer an integration of products and services by permitting it to obtain basic services in its own name, and to divide and shift them among its customers to meet their changing needs with less cost and delay than would accompany separate orders.[19] It is reasonable to anticipate that resale would add substantially to the quality and lower the price of ATTIS' offerings of integrated products and services.

10. AT&T's pleadings describe a second type of public benefit from lifting this bar — ATTIS could decrease the transaction costs for multiple customers to use jointly CPE, enhanced services, and basic services. Joint-use arrangements could foster innovative, efficient combinations of these offerings and uses of telecommunications facilities.[20] For example, ATTIS' proposed jointly-used tenant services would combine a PBX with resold basic services for multiple tenants in an office building.[21] In many cases, a large, jointly-used PBX can give tenants more features at a lower per-tenant price than if each tenant separately obtained CPE. Similarly, each tenant's total usage costs for basic services can also drop through joint usage. The PBX could route calls among various basic services which were selected to meet the tenants' demands at minimum costs; the PBX also could perform the accounting and billing for each tenant's use of the basic services. ATTIS claims that the gains from this joint use would not occur if a single supplier could not assess the tenants' needs for PBX features and basic services; obtain and program a PBX to meet those demands, including for optimal routing among the basic services selected; obtain and provide the basic services; organize the tenants; and adapt the operation of the PBX-and-services system as tenants' demands and services' prices change. Another illustration described by ATTIS involves inquiries it received from large businesses seeking jointly to use basic private line transmission services (Electronic Tandem Networks and Distributed Communications Systems) without losing the advantages of their dedicated systems.[22] Many large users lack the expertise or desire to

[19] *See* letters filed in CC Docket No. 83-1147 supporting changes in the regulation of AT&T to decrease the time and cost necessary for AT&T to offer new services: Prudential-Bache Securities (May 15, 1984); FoxMeyer Drug Co. (May 16, 1984); Computer, Inc., Alliance Insurance Co., Farmers Alliance Insurance Co., Iowa Public Service Co. (May 17, 1984); Kaiser Aluminum and Chemical Corp., Cargill, Inc. (May 18, 1984). *See also AT&T-IS Will Coordinate Maintenance of its Equipment and Customer Lines Under Plan*, 50 Telecom. Rpts. (June 11, 1984) 26.

[20] *See, e.g.*, Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, *supra*, 83 FCC 2d at 172, 180-82.

[21] *ATTIS Petition* at 6-12.

[22] ATTIS Comments in CC Docket No. 83-1375 at 9-10. There have been two recent examples showing AT&T's perception of demand for shared basic services. ATCOM filed a tariff for a new packet switched service, ACCUNET Packet Service, proposing "a shared packet network, with both the packet switches and trunks being shared among

arrange for sharing on their own. With resale, ATTIS could supply the CPE and enhanced features used for these services in an optimal configuration for the multiple customers and their transmission services; select, obtain, and provide the transmission services and modify their configuration and amounts in light of changing demands and prices; and perform maintenance, accounting, and billing.

11. Again, other firms have implemented the joint use arrangements contemplated by ATTIS, some with more integration through ownership of transmission facilities. Perhaps ATCOM will offer other such services to help meet this demand.[23] Yet, consumers will gain from ATTIS supplying a larger range of services along with its CPE and enhanced services, including integrations of products and services that ATCOM could not offer as basic services. Currently, ATTIS can promote joint use by organizing customers and helping them select and order services. But, allowing ATTIS to resell services would increase its capabilities in this regard by permitting it to obtain basic services in its own name and shift them among its customers to meet their changing needs with less cost and delay than would accompany separate orders. It is reasonable to antici-

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users. Accordingly, customers would no longer be responsible for providing their own trunks between switches." AT&T Communications Transmittal No. 59 (March 21, 1984), Application No. 30 (February 21, 1984). ATCOM described packet switching services as highly competitive, including some established competitors with extensive networks, expertise, and resources, *e.g.*, GTE Telenet, Tymnet, Uninet, Autonet, Compuserve, Safelink, RCA Cylix, MCI Mail Packet, Graphnet, ITT FaxPak, and IBM Information Network. AT&T Communications Transmittal No. 59, *supra*, at Attachment A. AT&T stated that it has letters of intent to use ACCUNET Packet Service from four customers other than ATTIS. Reply Comments of AT&T regarding Transmittal No. 59 at 5 (April 26, 1984). IBM's Petition to Suspend and Investigate the ACCUNET tariff (April 16, 1984) states that this offering should be provided by ATTIS, not ATCOM. IBM agrees with ATCOM's assessment of strong competition in these offerings. This tariff has not become effective.

In a related matter, on September 21, 1983, ATCOM filed Transmittal 14364 proposing to offer a special billing arrangement to permit shared use of its EPSCS (Enhanced Private Switched Communications Service) network. This billing service would enable ATCOM to identify the traffic of individual sharing customers so that they can be separately billed. ATCOM withdrew this filing on December 19, 1983, by Transmittal No. 14422; Common Carrier Bureau Mimeo No. 1491 (released December 21, 1983). *See also* AT&T Communications Transmittal No. 36 (February 14, 1984) proposing to withdraw its Billing Allocation Arrangement from its Tariff F.C.C. No. 3; Common Carrier Bureau Mimeo No. 3193 (released March 28, 1983). North American Philipps Corp. supported ATCOM's proposed Billing Allocation Arrangement as representing "competition in its truest form: customer demands for new and varied forms of service have been met by an innovative carrier response to such demands" (comments filed April 4, 1984). This tariff has not become effective.

[23] We encouraged ATCOM to adopt tariff changes to accommodate smaller user. *See* AT&T: Basic Packet Switching Service, 94 FCC 2d 48, 60 (1983).

pate that resale would add substantially to the quality and lower the price of ATTIS' offerings of jointly-used products and services, and promote efficiency in the use of basic services by subscribers.[24] Also, ATTIS' expanded capabilities in these activities are likely to stimulate competition (see para. 12 *infra*).

12. Third, ATTIS' entry into resold basic services is likely to stimulate competition in CPE, enhanced services, basic services, and packages of these products and services. ATTIS will thereby raise the quality and lower the prices of telecommunications products and services. This Commission is strongly committed to promoting competition in telecommunications products and services.[25] The *Notice* and comments of opponents to ATTIS providing basic, resold services discussed the possible competitive harms from practices by which ATCOM might confer on ATTIS market power or might engage in discriminatory preferences. These possible costs will be evaluated in paras. 15-26 *infra*. As shown *infra*, we can be reasonably confident that ATCOM could not employ such harmful practices; then, ATTIS' entry into basic, resold services is likely to increase competition in a wide range of products and services.[26] ATTIS' broader range of services might expand the types of products and services available to consumers. Even if ATTIS' offerings are not distinct, it may be an efficient supplier of low price/high quality products and services. *See* paras. 8-11 *supra*. Other suppliers would be forced by this new competition to increase their attractiveness to consumers with lower prices, higher quality, and innovative offerings. Providing enhanced services, supplying resold basic services, and (with our price-predictability program) distributing CPE are competitive activities.[27] There is also

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[24] *See* note 19 *supra*.

[25] *See, e.g.*, Private Line Rate Structure and Volume Discount Practices, *supra*; Competitive Carrier Rulemaking, 48 Fed. Reg. 52452 (November 18, 1983); Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* World Communications v. FCC, D.C. Cir. No. 82-2054 (June 1, 1984). *Second Computer Inquiry, supra*; Domestic Communications Satellite Facilities, 35 FCC 2d 844 (1972); Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities and Transportation Comm'n. v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[26] *See, e.g.*, comments in CC Docket No. 83-1375 of ATTIS at 2; IBM at 13. Other suppliers today are free to provide basic services—via resale or their own transmission facilities—in conjunction with CPE and enhanced services.

[27] *See Second Computer Inquiry*, 77 FCC 2d at 433, 440; Competitive Carrier Rulemaking, 91 FCC 2d 59, 67-70 (1982), *recon.*, 93 FCC 2d 54 (1983), 48 Fed. Reg. 52452, 52460 (November 18, 1983); Detariffing of CPE, FCC 83-551, at 27 (released December 15, 1983). The price-predictability program limits ATTIS' ability to raise the prices for its installed (embedded) CPE or to make installed CPE unavailable to certain customers. The sale program and limit on lease rates during the transition period were designed to protect against possible customer dislocations from sudden detariffing. *Id.* at 25-30. Competition in CPE manufacturing and retailing should continue to increase during the

strong competition in packages of these offerings.[28] While ATTIS' entry into basic, resold services may increase its share of CPE and enhanced-services sales, such expansion (given our regulatory protection against abuses of market power or other exclusionary conduct) is the essence of competition and not detrimental to consumers.[29]

13. To summarize this discussion of benefits, we find that authorizing ATTIS to provide basic, resold services is likely to result in public benefits from (1) increased efficiency in one-stop shopping and single-system management for some customers, (2) increased efficiency in multi-customer sharing of basic services, and of CPE or enhanced services combined with basic services, and (3) increased competition. While we reasonably expect substantial benefits, we cannot (and need not) anticipate all the benefits that may flow to consumers from lifting the ban on ATTIS providing basic, resold services.[30] We conclude that, together with the low expectation of costs discussed in paras. 15-26 *infra*, the expected

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price-predictability program. Also, ATTIS' sales program is cutting into the share of embedded CPE owned by ATTIS. We expect that ATTIS will lack market power in CPE after the price-predictability program terminates. ROLM estimated that ATTIS has only fifty percent of the installed CPE customer base, ROLM Reply Comments in CC Docket No. 83-1375, at 4. *See also* Detariffing of CPE, *supra*, at 27 n. 32. NATA estimated that there are 2,000 - 2,500 equipment vendors in the United States, with "rampant price competition." NATA, 1983-1984 Telecommunications Source Book at 106. According to NATA's estimates, the non-AT&T suppliers accounted for about 61 percent of PBX shipments and 57 percent of key-set shipments in 1982. *Id.* at 109-21. NATA estimated that in 1979 non-AT&T suppliers accounted for about 50 percent of PBX shipments and 38 percent of key-set shipments. According to NATA, the Bell System's share of installed base declined from 1978 to 1982, by from about 63 to 56 percent for PBXs, and from about 76 to 71 percent for key sets. *Id.* Another survey estimated that there are 3000 firms supplying CPE for voice communications, ATTIS will supply only 29% of CPE for voice communications, and AT&T Technologies will account for only 31% of PBX line shipments in 1984. *Composite Telecom Industry Poised to Spend $31 Billion in 1984*, Telephony (January 16, 1984) 34, 49. We believe that ATTIS faces strong competition for new single-line CPE, and that its share of such installed equipment is declining. *See* Detariffing of CPE, *supra*, para. 4 & n. 8, para. 69 & n. 63.

[28] *See* note 22 *supra*; Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, *supra*, 83 FCC 2d at 180.

[29] *See, e.g.*, Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983) ("that the dominant firm in any market may, through technological innovation, expand the market share, increase consumer brand identification, or create demand for new products is perfectly consistent with the competitive forces that the Sherman Act was intended to foster"); Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1348 (9th Cir. 1982); Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); California Computer Products v. IBM, 613 F.2d 727, 744 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 286 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Telex Corp. v. IBM, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

[30] *See* Graphnet Systems, 71 FCC 2d 471, 523 (1979).

benefits justify expanding the range of ATTIS' authorized activities to include basic, resold services.

14. Denying ATTIS the authority to resell some or all of ATCOM's services would limit the public benefits from ATTIS' basic, resold services.[31] Several commenters stated that there are no or few alternative suppliers of close substitutes for some of ATCOM's services.[32] If these claims are true, the range of ATTIS' offerings would be limited by a bar on ATTIS reselling those ATCOM services; ATTIS could not obtain close substitutes from unaffiliated carriers. In addition, the combination of barring ATTIS from reselling some or all of ATCOM's services, barring ATTIS from owning transmission facilities,[33] and the incomplete national availability of many Other Common Carriers' (OCCs') facilities[34] would limit the geographic areas where ATTIS could provide certain offerings. We seek to promote the widest possible availability of the public benefits from ATTIS' basic, resold services, consistent with the goal expressed in 47 U.S.C. § 151. Restrictions on ATTIS' authority to resell ATCOM's services would constrict the competitive stimulation we expect from our

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[31] The *Notice* discussed three alternatives for authorizing ATTIS to provide basic, resold services: (1) resale of any service supplied by an unaffiliated carrier; (2) resale of services of any unaffiliated carrier and any satellite service supplied by an affiliated carrier (including ATCOM) as long as that service is available on an unbundled, nondiscriminatory basis; and (3) resale of services of any unaffiliated carrier and any service supplied by an affiliated carrier on an unbundled, nondiscriminatory basis. 49 Fed. Reg. at 1249, 1250-51. Several commenters argued that any authority for ATTIS to provide basic, resold services should be restricted to unaffiliated carriers for at least a period during which we can gain experience with ATTIS' expanded range of activities. For the reasons discussed *infra*, we do not believe that the dangers of cross-subsidization and anticompetitive conduct which these commenters use to justify this restriction will materialize. Furthermore, such restriction will deprive consumers of certain benefits of ATTIS resale.

[32] *See, e.g.*, comments in CC Docket No. 83-1147 of U.S. Department of Justice and Ad Hoc Telecommunications Users Committee (limited substitutes for ATCOM's 800 service); ADAPSO (limited substitutes for ATCOM's terrestrial private lines used in data communications and for 800 service); Association of American Railroads (satellite transmission limited substitute for AT&T's terrestrial services). We make no findings here on the relevant market(s) for evaluating ATCOM's power in its various services.

[33] We do not affect the bar on ATTIS owning transmission facilities by our action today.

[34] *See* comments in CC Docket No. 83-1147 of Rural Telephone Coalition (ATCOM is the sole provider of interLATA services which can be accessed in most rural areas.); Vermont Department of Public Service and Public Service Board (Reply) at 4-5 (no facilities-based competition yet to Vermont); National Association of State Utility Consumer Advocates and the Citizens of the State of Florida at 1 (little competition on low-volume routes). "To restrict AT&T-IS to resale of the offerings of only unaffiliated carriers may prevent AT&T-IS and the customer from selecting the facility best suited to a particular service need and would restrict AT&T-IS and its customers to resold services and systems based on a smaller variety of generally less ubiquitous basic services." ATTIS Comments in CC Docket No. 83-1375 at 20-21.

decision today. Finally, any such restriction on ATTIS' authority to resell ATCOM's services would be difficult to administer. Limiting ATTIS' resale to only non-ATCOM services would be difficult to enforce because most OCCs resell some of ATCOM's services. Limiting ATTIS' resale to only certain ATCOM services would be difficult to enforce because ATCOM's services and facilities are intermingled, *e.g.*, some services can be provided by satellite or terrestrial facilities, or both. Paras. 18-22 *infra* discuss the Commission's ability to control through regulation the types of possible costs at which the limited-resale options were directed.

15. *Costs.* The *Notice* and comments point to several types of potential public costs from ATTIS supplying basic services via resale.[35] Much of the opposition to lifting the ban comes from competing CPE suppliers and OCCs. Some commenters also point to the problems of increased regulatory involvement with ATTIS. Close regulatory scrutiny of ATTIS' rates would be necessary to protect customers from being charged supracompetitive prices only if ATTIS gained market power in basic services.[36] Also, close regulatory scrutiny of ATTIS' practices then would be necessary to protect competition only if ATTIS gained market power. The *Second Computer Inquiry* adopted structural separation, *inter alia*, to promote effective rate-base regulation (limit cost shifting from a firm's competitive activities to its regulated, monopoly activities) and to limit opportunities for discriminatory, exclusionary abuses of market power. The issue here is whether it is reasonable to believe that ATTIS will gain the ability to shift costs from unregulated to regulated activities and to engage in anticompetitive practices by providing basic, resold services; such ability could undermine many of the benefits of the *Second Computer Inquiry*'s structural separation.[37] We conclude that our regulatory controls make it unreasonable to anticipate these costs.

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[35] *See, e.g.*, Comments in CC Docket No. 83-1375 of Tandy (Reply) at 18-19, IDCMA at 18-19, SBS at 7-11, ADAPSO at 16, RCA at 6, U.S. Telephone at 11, GTE at 16-19 and (Reply) at 9-10, Lexitel at 10-14; Opposition to *ATTIS Petition* of ALTEL at 3-4, NYNEX at 1; Reply Comments in CC Docket No. 83-1147 of IDCMA at 16; ROLM at 5; Lexitel at 5-7.

[36] Market power is the ability profitably to charge prices above the competitive level. *See* Competitive Carrier Rulemaking, 48 Fed. Reg. 52452, 52454-55 (November 18, 1983). For ATTIS to possess market power, ATTIS would require a high share of sales in a relevant market, and its competitors would have to be limited in their ability to expand their output of substitutable services at costs comparable to those of ATTIS (barriers to entry and expansion).

[37] Some opponents claim that authorizing ATTIS to provide basic, resold services would generate all of the costs addressed by structural separation in the *Second Computer Inquiry, i.e.*, massive cross-subsidization and anticompetitive conduct. *See, e.g.* Comments in CC Docket No. 83-1375 of ADAPSO at 17, Bell Atlantic at 2, ROLM (Reply) at 9, NATA at 8-11, Tandy (Reply) at 16, Telesphere Network at 3, ITT World Communications Services at 1.

16. Regarding ATTIS' acquisition of market power in basic services, opponents of ATTIS resale claimed that (1) ATCOM could design its service offerings so that ATTIS resold a large share of some or all of ATCOM's services;[38] (2) ATCOM could encourage migration of its customers to ATTIS; (3) ATCOM could discriminate in favor of ATTIS in price, quality, maintenance, and installation of its basic services used for resale; and (4) ATTIS could bundle its "monopolized" CPE with its basic services and thereby reduce competition in basic services. Furthermore, some commenters claimed that ATTIS resale will increase exchange bypass. We take these concerns seriously and will explain carefully our regulatory safeguards against possible harms to the public interest from allowing ATTIS to provide basic, resold services. In light of these regulatory safeguards, we do not believe that ATTIS will acquire market power in basic services, or be able to engage in cross-subsidization or anticompetitive conduct. Therefore, we do not believe that it is necessary to restrict ATTIS' basic services to resale of unaffiliated carriers' services, or to those services plus some of ATCOM's services.

17. Three regulatory tools will be applied to protect against ATCOM designing its services and procedures so that ATTIS acquires a large share of its capacity and customers, or gains preferences by discriminatory offerings: (1) review of ATCOM's tariffs; (2) complaints against ATCOM or ATTIS; and (3) two reports to be filed by ATCOM.

18. Our primary tool will be review of ATCOM's tariffs.[39] ATCOM is regulated as a dominant carrier and must file cost-supported tariffs.[40] The Commission has an opportunity to review, and interested parties have an opportunity to comment on, ATCOM's tariffs before they go into effect. We can suspend and investigate ATCOM's tariff filings, and prescribe just and reasonable charges, regulations, and practices, 47 U.S.C. §§ 201-05. ATCOM bears the burden of proving that its proposed tariffs are just,

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[38] The *Notice* discussed a service proposed by AT&T which appeared targeted for use by ATTIS' predecessor, AT&T: Basic (Bell) Packet Switching Service (BPSS), 91 FCC 2d 1 (1982), 94 FCC 2d 48 (1983).

[39] *See, e.g.*, comments in CC Docket No. 83-1375 of NTIA at 7, IBM at 6.

[40] 47 C.F.R. § 61.38. If adopted, the Commission's proposal to shorten tariff notice periods for all dominant carriers including AT&T would not sacrifice the ability of the tariff review process to identify and require changes to any unjust, unreasonable, or discriminatory tariffs proposed by ATCOM. Amendment of Sections 1 and 61 of the Commission's Rules, 95 FCC 2d 45 (1983). Furthermore, in CC Docket No. 83-1147, we are evaluating ATCOM's market power and what regulatory tools will best promote the public interest when applied to ATCOM. We may propose to regulate some or all of ATCOM's services without requiring tariffs. However, we would implement such a change only after finding that, in light of our complaint process and market forces, ATCOM could not charge unjust or unreasonable rates for such services, and could not discriminate against or in favor of any customer, including ATTIS.

reasonable, and nondiscriminatory.[41] We have had experience in regulating ATCOM's offerings to ensure against discrimination favoring ATTIS when ATTIS in effect resells ATCOM's services to provide enhanced services; the existence of demand for ATCOM's offerings by other resellers and customers should check ATCOM's incentives and ability to discriminate in favor of ATTIS.[42] Through adoption of guidelines for private line services, we recently reaffirmed our commitment to ensuring that ATCOM's offerings are unbundled and do not discriminate among groups of customers.[43] Any private line volume discount offered by ATCOM must be available on a nondiscriminatory, unbundled basis which is either cost justified or reasonably designed to meet competition and promote reasonable rates for all of ATCOM's services.[44] We doubt that any volume discount offered by ATCOM for which ATTIS is the only customer would meet this standard for a lawful common carrier rate. Similarly, we would be suspicious of, and apply close tariff review to, any offering for which one customer (including ATTIS) accounts for a large share of total usage.[45] The reporting requirements described in para. 21 will assist in identifying such offerings. We will scrutinize closely ATCOM's tariffs to safeguard our policies favoring resale, sharing, and interconnection[46] by any user. In addition, we will require careful justification for any tariff provisions specifying a decline in service quality (*e.g.*, longer waiting periods to obtain service, more stringent service cancellation provisions, higher deposits, or fewer features[47]) which may suggest a strategy of migrating customers from ATCOM to ATTIS.

19. As a further safeguard against the possibility that ATCOM may discriminate by dedicating facilities or services to ATTIS' use, we reaffirm the *Second Computer Inquiry*'s prohibition on ATCOM supply-

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[41] 47 U.S.C. § 204.

[42] *See* AT&T: BPSS, *supra*; note 56 *infra.*

[43] Private Line Rate Structures and Volume Discount Practices, *supra*, at 3-4.

[44] *Id.* at 23-32.

[45] *See* AT&T: BPSS, *supra*; AT&T: Series 9000 (R.R. Donnelley), 89 FCC 2d 1116 (1982).

[46] Our policy favoring reasonable, nondiscriminatory interconnection practices and charges between carriers is well established, pursuant to 47 U.S.C. §§ 201-02. *See* Bell Systems Tariff Offerings, 46 F.C.C. 2d 413, 428, *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); AT&T: Offer of Facilities to Other Common carriers, 92 F.C.C. 2d 46, *modified*, FCC 83-550 (released December 12, 1983); Cellular Communication Systems, 89 F.C.C. 2d 58, 81 (1982); Lincoln Tel. & Tel. Co., 72 F.C.C. 2d 724 (1979), *aff'd*, 659 F.2d 1092 (D.C. Cir. 1981); Interconnection Facilities Provided to the Int'l Record Carriers, 63 F.C.C. 2d 761 (1977); AT&T: Restrictions on Interconnection of Private Line Services, 60 F.C.C. 2d 939 (1976); Fort Mill Telephone Co. v. FCC, 719 F.2d 89 (4th Cir. 1983).

[47] *See generally* Investigation of Access and Divestiture Related Tariffs, FCC 84-51 (released February 17, 1984) (ECA Tariff Order).

ing any services or facilities to ATTIS other than through general tariffed offerings.[48] This means that the same transmission facilities, service features, and procedures offered by ATCOM to ATTIS must be made available to all other resellers and other customers on the same terms and conditions.[49]

20. Second, our complaint procedure, 47 U.S.C. § 208, is available to customers and competitors with claims that ATCOM discriminates in order processing, installation, maintenance, price, quality, or in any other way. In the *Second Computer Inquiry*, we stressed the importance of nondiscriminatory access to ATCOM's services for AT&T's separated subsidiary and all other customers.[50] Furthermore, ATTIS must operate independently from ATCOM in the furnishing of basic services, *e.g.*, separate marketing, facilities, and personnel.[51] Additionally, as a provider of basic, common carrier services subject to regulation under Title II of the Communications Act, ATTIS would be required to supply its basic services at just, reasonable and nondiscriminatory rates, 47 U.S.C. §§ 201-02, comply with the *Second Computer Inquiry's* unbundling requirements,[52] and provide reasonable, nondiscriminatory interconnections to its basic services for CPE and enhanced services supplied by other vendors. Our complaint process is available to enforce these requirements on ATTIS.[53] We can investigate complaints against ATCOM's or ATTIS' practices, including their interconnection, resale, and duty-to-serve practices. If a rate or practice is found unlawful, the carrier may be liable for damages under 47 U.S.C. § 206, and restrictions on ATTIS' provision of basic, resold services may be reimposed as a remedy.

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[48] In CC Docket No. 83-1147, Telesphere Network's comments at 6 suggested the possible abuse of carrier-to-carrier contracts between ATCOM and ATTIS to evade regulatory scrutiny of the terms by which ATTIS uses ATCOM's services and facilities. NTIA's reply comments at 7 suggested that the Commission can eliminate this possible problem by requiring that ATTIS obtain all its transmission capacity from ATCOM under tariff. Recently, we proposed to require common carriers to provide special construction of lines and special service arrangements only as non-common carrier, non-tariffed offerings. Special Construction of Lines and Special Service Arrangements Provided by Common Carriers, FCC 84-146 (released April 30, 1984). If that proposal is adopted, under this Order ATCOM could not provide special activities to ATTIS. However, ATTIS could obtain special activities from unaffiliated carriers as long as ATTIS complies with the prohibition against ownership of transmission facilities.

[49] 77 FCC 2d at 474; 47 CFR § 64.702(c)(1).

[50] 77 FCC 2d at 474.

[51] 47 CFR § 64.702(c)(2).

[52] 77 FCC 2d at 439-40, 445-47, 475; 47 CFR § 64.702(e). If ATTIS offers a basic service as part of a package with CPE or an enhanced service, it must also offer the basic service on a stand-alone basis.

[53] *See* AT&T: Notice of Apparent Liability, FCC 83-514 (released November 17, 1983) (penalty imposed for violation of structural separation conditions of the *Second Computer Inquiry*).

21. Finally, we hereby require, at least on a temporary basis, that ATCOM file quarterly reports on two aspects of its provision of services to ATTIS.[54] First, ATCOM must identify any offering for which use by ATTIS accounts for over 50 percent of total monthly use. For purposes of this requirement, we define "offering" to be a specific volume or configuration of a service, or specific function or option associated with a service, or any other service feature for which there is a rate element or tariff term (*e.g.*, an ordering or termination procedure). This report will help identify areas which may warrant tariff or other Commission investigation, or, perhaps, revision of our decision to allow ATTIS to provide basic, resold services. Our concerns about possible discrimination apply equally to ATCOM's services used by ATTIS for basic or enhanced services. Furthermore, because ATCOM may be uncertain whether an order by ATTIS for a service is to be resold as a basic or enhanced service, this report should cover all orders by ATTIS for ATCOM's services. Second, ATCOM must report the average (mean and median) times for order processing, installation, and maintenance for ATTIS' order—by WATS, 800 service, and private line service—and for orders of other customers for the same services. We are greatly concerned about ATCOM's current backlog in satisfying WATS, 800 service, and private line orders.[55] We recognize that this backlog creates opportunities and incentives for ATCOM to give preferential treatment to ATTIS' orders outside of its tariff provisions. This report, together with possible complaints of other ATCOM customers or ATTIS' competitors, will inform the Commission of such discrimination and help speed appropriate enforcement actions against ATCOM.

22. We are confident that these regulatory tools will provide sufficient protection for consumers against AT&T's potential use of ATCOM's services to discriminate against any OCC, to harm certain customers, or to confer market power on ATTIS. We will use these tools to ensure that ATTIS obtains MTS, WATS, private line, and other offerings from ATCOM on the same terms and conditions as do the many current resellers of ATCOM's services and other customers.[56] Similarly, with

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[54] IBM's comments in CC Docket No. 83-1375 at 8 n. 16 recommended that any reporting requirement be placed on ATCOM rather than ATTIS to avoid excessive regulatory entanglement with ATTIS.

[55] *See* Letters to D. Culkin, AT&T, from Chief, Common Carrier Bureau (June 7, 1984, and March 8, 1984); *AT&T Communications Pledges "Whatever it Takes" to Eliminate Present Service Problems in Private Line, WATS, and "800" Service; FCC to Receive Monthly Reports For Duration*, 50 Telecom. Rpts. (May 21, 1984) 4-6; Reply Comments in CC Docket No. 83-1147 of Lexitel at 6.

[56] Comments of ATTIS in CC Docket No. 83-1375 at 11 estimate that there are over 350 current resellers of ATCOM's services. At least six Other Common Carriers or resellers had interstate revenues exceeding $100 million in 1983 and supplied some of their

regard to fears that ATCOM's dealings with exchange carriers will benefit ATTIS' orders for exchange access, we will use our tariff-review and complaint processes to protect against any discriminatory treatment favoring ATTIS in exchange access. Exchange carriers are regulated as dominant carriers; their tariffs must be filed on 90-days notice with cost support.[57] Furthermore, the AT&T divestiture and the implementation of access tariffs ended the financial integration which might have given exchange carriers an incentive to discriminate in favor of ATTIS over other interexchange carriers. These protections limit the possible harm to competition and the consequential costs to consumers from ATTIS' entry as a supplier of basic, resold services. ATTIS' entry should not impair the services and terms offered by ATCOM and exchange carriers to end users or to ATTIS' rivals who supply CPE, enhanced services, or basic services.

23. Another claim is that ATTIS could exclude competition and charge supracompetitive prices for basic services by bundling its CPE with basic services, or by taking advantage of its CPE customer base to market basic services.[58] Given our price-predictability program for embedded CPE and the intense competition for sales of new CPE, we doubt that ATTIS has or will have market power in CPE.[59] Our price-predictability program limits ATTIS' ability to force its CPE customers — through threats of higher CPE prices or making its CPE unavailable — to take its basic services. Growing competition for new CPE sales and sales of installed CPE during this program should leave ATTIS unable to apply leverage from CPE to lessen competition in basic services after the program expires. CPE competition has changed from the market conditions that prevailed in 1980 when we adopted the *Second Computer Inquiry.* Still, this Order does not affect the bar on ATCOM bundling its basic services with CPE, or ATCOM discriminating in its rates or rate structures in favor of

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services through resale of ATCOM's private line and WATS offerings. *Composite Telecom Industry Poised to Spend $31 Billion in 1984, supra,* at 49; data filed with the Commission pursuant to 47 C.F.R. § 43.21; comments of AT&T in CC Docket No. 83-1147 at Appendices A and B. In addition, there are many large customers with private or shared networks utilizing ATCOM's offerings who would be in a position to take some of ATCOM's offerings that are attractive to ATTIS.

[57] *See* Investigation of Access and Divestiture Related Tariffs, FCC 84-188 (released April 27, 1984), FCC 84-51 (released February 15, 1984), Mimeo No. 2802 (released March 7, 1984).

[58] *See, e.g.,* comments of IDCMA in CC Docket No. 83-1147 at 18-27, reply comments of Tandy Corp. in CC Docket No. 83-1375 at 13.

[59] *See* note 27 *supra.* In antitrust law, unlawful tying requires that the seller "has some advantage not shared by his competitors in the tying product." Fortner Enter. v. United States Steel Corp., 429 U.S. 610, 629 (1977); Jefferson Parish, *supra,* 52 U.S.L.W. at 4388 ("we have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market").

ATTIS' products and services.[60] Although as discussed *infra* we forbear from requiring certain filings by ATTIS, ATTIS will be subject to the provisions of Section 202(a) prohibiting any unreasonable preference in its common carrier services to its CPE[61] or enhanced-services customers, 47 U.S.C. § 202(a). In addition to its unbundled basic-service offerings, ATTIS could make packages of its basic-service and other offerings available for those customers who prefer one-stop shopping and single-system management. As explained *supra*, the availability of these packages would yield efficiencies to these customers. Yet, we do not believe that these packages will be a source of market power for ATTIS. We expect that a number of customers will demand joint services. If ATTIS lacks discriminatory use of basic services, we expect that ATTIS will face substantial competition from others in designing and operating such services.[62] ATTIS should not be able to use its CPE position to lessen competition in basic services, and vice versa. Nor should it be able to cross-subsidize one set of activities with revenues from the other.

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[60] *See* AT&T: BPSS, *supra*, 94 FCC 2d at 64-65. We express no opinion here on the merits of the claims in *AT&T's Petition* that the structural separation of the *Second Computer Inquiry* should be removed. We do not require structural separation between ATTIS' provision of basic, resold services and its provision of CPE and enhanced services. Such structural separation could eliminate most of the anticipated public benefits from ATTIS providing basic resold services. *See* paras. 6-13 *supra*. We expect that ATTIS' market power in basic services will be far less than ATCOM's. Thus, our concerns about cost shifting and exclusionary conduct are far less for ATTIS than ATCOM. While we find that structural separation of ATTIS' CPE activities from its basic services would not be in the public interest, we do not affect the requirement that ATCOM's basic services be separated from AT&T's CPE offerings.

[61] Lexitel, in its comments in CC Docket No. 83-1375 at 13 and reply comments 6-8, claims that ATTIS will use information about its CPE customers to disadvantage OCCs and favor the services offered by ATCOM or ATTIS. *See also* reply comments CC Docket No. 83-1375 of Tandy Corp. at 13, NATA at 12 (citing ATTIS' enormous embedded base of CPE). Our concern about such conduct is less now than it was when we adopted structural separation for AT&T in the *Second Computer Inquiry* because AT&T's share of embedded CPE and new CPE supplied has declined greatly. *Supra* note 27. With the transfer of embedded CPE from the BOCs to ATTIS, ATTIS did not get access to information about the CPE customers' current transmission usage for marketing purposes. Detariffing of CPE, *supra*, paras. 120, 124. Numerous CPE suppliers and common carriers have been able to gain substantial market positions without access to ATTIS' information about its CPE customers. While ATTIS' information about its CPE customers may give it some advantage over certain suppliers of basic services, CPE, or packages, we do not believe that this advantage is substantial enough to give ATTIS market power in basic services, CPE, or packages.

[62] There are other suppliers of sharing-related services, including multitenant-building-shared services and teleports, note 17 *supra*, and barriers to entry into the management of shared telecommunications services are low. *See* Lexitel comments in CC Docket No. 83-1375 at 9.

24. Some commenters contend that authorizing ATTIS to provide basic services via resale will force the Commission to regulate ATTIS' cost allocations between its basic services and its CPE and enhanced-service activities. As explained in the next section, we conclude that it is in the public interest for us to forbear from requiring ATTIS to file tariffs or Section 214 applications. Given the market forces which will check ATTIS' rates and practices, we do not expect to have to examine frequently ATTIS' cost support for its rates. We have not been required to engage in such rate-base regulation of any carrier subject to forbearance, either in response to a complaint or on our own initiative since we established forbearance in 1982. Our regulatory involvement in ATTIS' offerings is likely to be limited to the complaint process concerning, for example, discriminatory rates. Most of these types of complaints would not involve cost allocations. Finally, if a claim of predatory pricing of basic services is filed against ATTIS, most of its costs for providing basic services should be readily identifiable—the rates it pays to the underlying carriers whose services it resells. Problems of allocating ATTIS' joint and common costs, if they arise, should be small. Our decision today will continue the ban on joint and common costs between ATTIS and ATCOM ordered by the *Second Computer Inquiry.* Furthermore, our decision here will not impede our efforts to determine the cost basis of ATCOM's rates. Note that the capitalization of ATTIS by ATCOM is limited, which restricts ATTIS' potential predatory strategies. *See* Enhanced Services Capitalization Order, 90 FCC 2d 404, 407-08 (1982); Detariffing of CPE, *supra*, paras. 194-96.

25. As a final consideration in assessing possible public costs, several commenters, particularly exchange carriers, claim that authorizing ATTIS to provide basic, resold services will increase bypass of exchange facilities. Illustrations are given in terms of ATTIS diverting traffic from MTS and WATS to shared use of ATCOM's private line services (which make a lower contribution to the costs of non-traffic sensitive (NTS) exchange facilities).[63] Through our access-charge rules[64] and review of access tariffs, we will look carefully at any opportunity for ATTIS to characterize and configure its MTS/WATS-like services so as to avoid paying switched access charges. Moreover, we have found in *MTS and WATS Market Structure* that limiting uneconomic bypass of the local switched network depends on implementing customer line charges or otherwise decreasing the NTS costs covered by usage rates for switched

[63] *See, e.g.*, comments in CC Docket 83-1375 of GTE at 18, Lexitel at 14, NYNEX at 1, Pacific Bell and Nevada Bell (Reply) at 3.

[64] MTS and WATS Market Structure (CC Docket No. 78-72, Phase I), 93 FCC 2d 241, *recon.*, FCC 83-356 (released August 22, 1983), *further recon.*, FCC 84-36 (released February 15, 1984).

services.[65] We do not believe that restricting ATTIS' offerings while OCCs provide the same purportedly-undesirable services increases the long-term viability of exchange carriers and universal service. The speculative costs of the claimed increment in bypass from resale by ATTIS do not outweigh the public benefits we expect from ATTIS' new offerings.

26. In sum, we conclude that resale by ATTIS will not cause the harms addressed by the *Second Computer Inquiry* four years ago. The major safeguards of the *Second Computer Inquiry* remain unaffected by our action today, *e.g.*, the requirement that ATCOM's services be structurally separated from AT&T's CPE and enhanced services, the requirement that ATTIS deal with ATCOM on the same terms and conditions that other suppliers do, and the facilities-ownership bar on ATTIS. We expect that ATTIS will lack market power as a reseller of basic services, and we will regulate and monitor ATCOM's offerings to ensure that ATTIS is not unfairly advantaged by discrimination or other practices. With the price-predictability program for ATTIS' embedded CPE, we also expect that ATTIS will lack market power in CPE. In addition, ATTIS faces strong competition in enhanced services. All things considered, ATTIS should be unable to cross-subsidize any of its offerings, and it should be unprofitable for ATTIS to charge unreasonably high (monopolistic), unreasonably low (predatory), or discriminatory prices for any of its offerings. Nor should ATTIS be able profitably to engage in anticompetitive leverage (tying). Tariff review of ATCOM's offerings, our complaint process for ATCOM's and ATTIS' basic services, the reporting requirements on ATCOM regarding its services provided to ATTIS, and market forces should check any possible public costs from authorizing ATTIS to provide basic, resold services. We believe that the public has benefitted from ATTIS' provision of enhanced services, including the effective resale of ATCOM's basic services, through more intense competition in providing enhanced services and integrated offerings of CPE and enhanced services by ATCOM. We expect that the public benefits of allowing ATTIS to supply basic, resold services—including via any of ATCOM's tariffed offerings—will outweigh the public costs.

III. Forbearance Applied to ATTIS' Basic, Resold Services

27. In the *Competitive Carrier Rulemaking*, we decided to forbear requiring tariff filings and Section 214 facilities applications for all domestic, interstate services provided by resellers, as well as for services

[65] *Id.*

provided by specialized common carriers.[66] We found that our complaint process and market forces gave us sufficient certainty that resellers would charge just, reasonable, and nondiscriminatory rates for these services. Each reseller competes with other resellers as well as facilities-based carriers. The price a reseller can charge for an offering is checked by the ability of other resellers to supply a similar offering using similar services of a facilities-based carrier, as well as the ability of a facilities-based carrier to supply a similar offering itself. We concluded that all resellers that we analyzed are nondominant, but stated a possible exception for basic, resold services provided by ATTIS, which we had not analyzed.[67]

28. As stated *supra*, we expect that ATTIS will be non-dominant in its offerings of basic, resold services.[68] Under our regulation, ATCOM must provide to all customers, including all OCCs, nondiscriminatory terms and practices for using its services. We will also scrutinize ATCOM's offerings to detect and prevent any attempts to target a large share of ATCOM's facilities, or any of ATCOM's services, for resale by ATTIS. The same regulatory scrutiny will apply to interstate offerings of exchange carriers that ATTIS would resell. In addition, we doubt that ATTIS will be able to acquire market power in basic services, or in any package including basic services, by leverage from its CPE and enhanced services. Therefore, we expect that ATTIS will have a small share of basic, domestic, interstate, interexchange services, and will be a non-dominant carrier. The reporting requirements we impose on ATCOM (see para. 21 *supra*) will help us monitor ATTIS' growth as a reseller of basic services. If future market conditions so indicate, we retain the authority to re-categorize ATTIS as a dominant carrier and change its regulatory filing requirements, or to impose other safeguards.

29. In the *Competitive Carrier Rulemaking*, we chose to regulate non-dominant carriers either by streamlined regulation (tariffs filed on 14 days' notice without cost support; semi-annual reports on facilities) or by forbearance (no tariffs required to be filed; semi-annual reports on facilities).[69] All resellers covered by the orders in that proceeding (which

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[66] 91 FCC 2d 59 (1982) (Second Report), *recon.* 93 FCC 2d 54 (1983), 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report).

[67] 93 FCC 2d at 61 and n. 17.

[68] In the Fourth Report in the *Competitive Carrier Rulemaking*, we found that a relevant market is all domestic, interstate, interexchange telecommunications services. 48 Fed. Reg. at 52456.

[69] Some commenters state that we should apply to ATTIS full regulation (tariffs filed on 90-days' notice with cost support; Section 214 applications for each line acquired for resale). *See, e.g.*, comments in CC Docket No. 83-1375 of Tandy Corp. (reply) at 26-28, NATA at 5-6. IDCMA favored streamlined regulation of ATTIS' basic, resold services over forbearance. IDCMA Comments in CC Docket No. 83-1375 at 24-27. *But see*

excludes ATTIS) are currently treated by forbearance, and we have received no meritorious complaints against their practices or rates. Streamlined regulation would give the Commission greater control over ATTIS' offerings of basic, resold services; its services would be offered through tariffs on file with the Commission, and we could suspend, investigate, and reject new tariff filings before they become effective. On the other hand, streamlined regulation of ATTIS poses problems. ATTIS' tariff filings probably would be an unnecessary and costly burden on it and on the Commission. The stimulus to competition we expect from our decision today would be less under streamlined regulation than under forbearance.[70] Because of the costs of filing tariffs and delay in the notice period, subjecting ATTIS to streamlined regulation would place it at a competitive disadvantage in offering new services and rates[71] compared to carriers subject to forbearance—all other resellers and all specialized common carriers—without corresponding benefits to consumers.

30. We conclude that the public interest requires that we apply forbearance to ATTIS' basic, resold services. Our complaint process and market forces should be sufficient to ensure that ATTIS' rates for basic services are just, reasonable, and nondiscriminatory. The benefits of increased competition and decreased regulatory burdens should outweigh any greater risks of unlawful practices by ATTIS under forbearance as compared to full or streamlined regulation. If our complaint process reveals unlawful practices by ATTIS, we may revise our decision to apply forbearance.

IV. Scope of Our Decision

31. This section addresses various issues raised by the *Notice* and in comments regarding ATTIS' basic, resold services. First, contrary to the suggestions of some commenters, we do not preempt state regulation of intrastate services provided by any carrier, including by ATTIS.[72] Some states have recently allowed entry of OCCs for intrastate services, and

comments in CC Docket 83-1375 favoring forbearance of NTIA at 9, IBM at 17-18. Pursuant to the *Second Computer Inquiry*, ATTIS is required to maintain books of account for its basic services separate from the books for its CPE and enhanced services, as are all common carriers offering CPE or enhanced services. 77 FCC 2d at 476. However, the check of market forces on ATTIS' prices for each of its offerings should make rare the need for detailed examination of ATTIS' cost allocation by the Commission. As explained in connection with the proposals for streamlined regulation, full regulation can also impede competition to the detriment of consumers.

[70] *See Competitive Carrier Rulemaking, supra*, 91 FCC 2d at 65, 48 Fed. Reg. at 52453 n.1, FCC 84-82 (released March 22, 1984) (Fourth Further Notice); Comments in CC Docket No. 83-1375 of IBM at 13.

[71] *See* note 19 *supra.*

[72] *See, e.g.*, comments in CC Docket No. 83-1375 of IBM at 20, ATTIS (Reply) at 32-33, U.S. West at 5, Pacific Bell and Nevada Bell (Reply) at 1-2, Bell Atlantic at 8.

others are considering the scope and terms for such entry. We have no record now on which to base a finding that the public interest would be served by this Commission at this time preempting state regulation and authorizing unlimited competitive entry, resale, sharing, and interconnection for intrastate basic services. On the other hand, we do not now believe that this Commission's concerns about competition in CPE require us to perform a state-by-state analysis of competition in intrastate basic services before authorizing — insofar as the restrictions in the *Second Computer Inquiry* are applicable — ATTIS to resell basic intrastate services in a state. At this time, we conclude that the *Second Computer Inquiry* should not bar ATTIS from offering basic, resold, intrastate services in any state where the state regulatory commission so authorizes it. In providing its intrastate services, ATTIS must comply with the applicable state regulations.

32. Similarly, we do not hereby authorize ATTIS to provide basic, resold, international services.[73] We have not yet addressed the issue of resale by any carrier of international private lines,[74] or forbearance for resellers of any international service.[75] Most of the benefits from authorizing ATTIS to provide basic, resold services will be realized if the scope of that authority is limited to domestic services for the near future. We delay such authorization for international services until we decide certain fundamental matters regarding international resale and/or there is an increase in international resale by carriers not affiliated with ATCOM.

33. Two Bell Operating Companies proposed that we use this proceeding to authorize basic, resold services provided by their separate subsidiaries established pursuant to this Commission's order.[76] The forms and activities of the BOCs' separate subsidiaries have not yet been settled, and special access tariffs have not yet become effective. Possible authorization for these subsidiaries to provide basic, resold services was not raised in the *Notice*, and it would be premature to address this issue here. We express no opinion on the merits of this issue here.

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[73] *See, e.g.*, comments in CC Docket No. 83-1375 of NTIA at 11, ATTIS (Reply) at 31-32, IBM at 18-20, ICA at 11-14, ADAPSO at 33.

[74] Resale and Shared Use of Common Carrier International Communications Services, 77 FCC 2d 831 (1980). *See also* AT&T: Revisions of Private Line Service Tariff FCC No. 260 and Tariff No. 3, Transmittal No. 92 (released June 14, 1984).

[75] *Competitive Carrier Rulemaking, supra*, 48 Fed. Reg. at 52453 n. 5.

[76] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 49 Fed. Reg. 1190 (January 10, 1984), *appeal pending sub nom.* Illinois Bell Tel. Co. v. FCC, Nos. 84-1145, 84-1382, 84-1475 (7th Cir., filed January 30, 1984). *See* Comments in CC Docket No. 83-1375 of Southwestern Bell at 4-5, BellSouth at 2.

V. Conclusion and Ordering Clause

34. We remain committed to the principles underlying the *Second Computer Inquiry.* We oppose opportunities for shifting costs from competitive to regulated monopoly services which thereby make the rates for the monopoly services unreasonable. Also, we oppose opportunities to use discriminatory access to regulated monopoly services or bundling of monopoly services with competitive products to exclude competition. By our decision today, we remove a regulatory burden with the expectation that consumers will benefit from an increased flow of innovative, efficient, competitive offerings to meet certain, specialized types of demands. Regulatory and market checks should continue to protect consumers against the harms of unreasonable rates for basic services and exclusionary conduct. Our decision is designed to promote competition, and we have the regulatory policies and procedures necessary to ensure that AT&T's new flexibility is not abused to reduce competition. We believe that ATTIS will face strong competition in providing basic, resold services and packages of products and services just as it does in providing enhanced services and, with our price-predictability program, CPE.

35. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j), 201-05, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 201-05, 214, That the policies set forth herein ARE ADOPTED, effective thirty (30) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Action Appealable

Review Board dismissed appeal of non-party because Commission's rules provide it no present route of appeal.
—*California B/cing Corp.*
BC Docket No. 80-698

FCC 84R-38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
California Broadcasting Corporation Ventura, California	BC Docket No. 80-698 File No. BPCT-790130LP
Channel Islands Television Corporation Ventura, California	BC Docket No. 80-699 File No. BPCT-790130LQ
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1984; Released: May 17, 1984

BY THE REVIEW BOARD:

1. The Review Board has before it: (a) an appeal, filed April 10, 1984, by the Los Angeles County Sheriff's Department (Sheriff) from a ruling by Administrative Law Judge Byron E. Harrison released March 7, 1984 (FCC 84M-1132) dismissing its pleading filed November 23, 1983, entitled Objection to Grant; (b) a motion for leave to appeal, filed April 10, 1984, by the Sheriff; (c) opposition to motion for leave to appeal and motion to strike appeal, filed April 25, 1984, by California Broadcasting Corporation (CBC); and (d) reply to opposition, filed May 7, 1984, by the Sheriff. The Sheriff's pleadings seek to have any grant made in this proceeding expressly conditioned on the outcome of its pending rulemaking petition in which it covets either UHF Channel 19 or Channel 16, the frequency

contested for in the instant proceeding.[1]

2. We will dismiss the Sheriff's appeal. Not only does the Sheriff's Department concede that it is not a party to this proceeding,[2] (nor did not seek to become one[3]), the Commission's rules provide it no present route of appeal. *See* 47 CFR §1.301. Neither the Board nor the Sheriff may make or break the law.[4]

3. ACCORDINGLY, IT IS ORDERED, That the appeal from ruling, filed April 10, 1984, by the Los Angeles County Sheriff's Department IS DISMISSED; that its motion for leave to appeal, filed April 10, 1984, IS GRANTED; and that the motion to strike appeal, filed April 25, 1984, by California Broadcasting Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[1] *See* Sheriff's Appeal Br. at 1-2 (*citing to* FCC RM-3975). However, as CBC observes:

> It is 'settled precedent that the *mere pendency of a rulemaking proceeding* does not affect the application of current substantive or procedural rules.' *Palm Beach Cable Television Co.*, 78 F.C.C.2d 1180, 1183 (1980) (emphasis added). *See Also Metromedia, Inc.*, 66 F.C.C.2d 566 (1977). It follows, *a fortiori*, that the mere filing of a *petition for rulemaking* cannot substantively or procedurally affect the ongoing Channel 16 proceeding.

CBC Opposition at 5. *But see infra* note 4.

[2] *See, e.g.*, Sheriff's Reply at 2. Accordingly, it is not entitled to file exceptions to the Initial Decision. 47 U.S.C. §409(b); 47 CFR §1.276(a); *Golden State Broadcasting Corp.*, 92 FCC 2d 761, 762-763 (Rev. Bd. 1982). The Sheriff recognizes its lack of standing. Sheriff's Motion at n.3.

[3] *See* Sheriff's Motion at 3.

[4] Our action has no bearing on the merits or the outcome of the Sheriff's pending rulemaking petition. No permittee or licensee has a property right in the license, 47 U.S.C. §§301, 309(b), or the frequency, *id.*, at §304; and any license granted is subject to future rule changes. *See FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814-815 (1978). The Commission is well aware of the Sheriff's ambitions respecting Channel 16, *see* FCC RM-3975, *supra*, on which it will act in due course.

Administrative Law Judge, Authority of Character Qualifications Interlocutory Ruling Appeal From Issue, Avoidance of

Review Board denied interlocutory appeal wherein applicant, apprehensive that ALJ would add a character issue against it, requested the Board to instruct ALJ to grant its application immediately. Board noted that the request for grant was premature since basic qualifying issues were outstanding.

—*Central Pacific B/cing Corp.*

MM Docket No. 83-785

FCC 83R-92

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Central Pacific Broadcasting Corporation Rancho Mirage, California	MM Docket No. 83-785 File No. BP-811015AC
Fred W. Volken d/b/a Radio San Jacinto San Jacinto, California	MM Docket No. 83-786 File No. BP-811015AN
Robert A. Jones et al., d/b/a North County Broadcasters San Marcos, California	MM Docket No. 83-787 File No. BP-811015AO
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1983; Released: November 14, 1983

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed October 4, 1983, by Radio 1210, Inc. (Radio 1210), successor in interest to North

County Broadcasters (North County),[1] pursuant to Section 1.301(a)(4) of the Commission's Rules,[2] from a Memorandum Opinion and Order by Administrative Law Judge Walter C. Miller (ALJ) granting, in part, a settlement agreement submitted by North County and Fred W. Volken d/b/a Radio San Jacinto (RSJ), and dismissing RSJ's application. Radio 1210 supports the grant of the settlement agreement and the dismissal of RSJ's application but seeks a directive from the Board to the ALJ to grant the remaining applications. Central Pacific Broadcasting Corporation (Central), the third applicant, offers no comment on the appeal. For the reasons set forth below, we will deny Radio 1210's appeal.

2. On August 24, 1983, North County and RSJ filed a Request for Approval of Agreement and attached settlement agreement with the ALJ, whereby RSJ would dismiss its application in return for the purchase of a 20% interest in North County by RSJ's sole principal, Fred Volken. The pleading also indicated that North County would tender an engineering amendment that would eliminate its mutual exclusivity with Central.[3] By *Memorandum Opinion and Order,* FCC 83M-3388, released September 27, 1983, the ALJ approved the agreement and dismissed RSJ's application. In so doing, however, he stated at note 3 of his *Order* that he could not grant North County's application without a hearing since serious character questions concerning one of its principals had been raised in another pending proceeding. Radio 1210 appeals from this ruling and argues that the ALJ should have granted its application and that of Central since "no basic qualifications issue was outstanding against any of the three applicants." Radio 1210's Br., at 2. Moreover, Radio 1210 requests that the Board instruct the ALJ to ignore the allegations in the other proceeding or, alternatively — should the Board determine that such allegations may be considered — to undertake to consider the matter itself after affording appellant an opportunity to submit to the Board a pleading in the nature of an opposition to a motion to enlarge. Appellant claims that affording it an opportunity to submit such a pleading to the ALJ would not be meaningful since, it asserts, the ALJ has already determined that an issue should be added, and, tentatively, that it should be resolved adversely to the applicant. Radio 1210's Br., at 4-5.

3. The Board will deny Radio 1210's appeal. Initially, appellant's contention that the ALJ erred by failing to grant its application and that of Central's is without merit. Contrary to Radio 1210's assertion, there

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[1] The change in the applicant's structure was approved by *Order,* FCC 83M-3319, released September 22, 1983.

[2] Section 1.301(a)(4), 47 CFR §1.301(a)(4), provides that rulings granting a joint request filed under Section 73.3525 without terminating the proceeding are appealable by any party as a matter of right.

[3] Such an amendment was filed, and accepted by the ALJ. *See Order,* FCC 83M-3156, released September 13, 1983.

were qualifying issues outstanding against both remaining applicants, on which the ALJ had not had an opportunity to pass, when the instant appeal was filed on October 4. (See motions for summary decision filed October 18 and 19, 1983, respectively, by Central and Radio 1210.)[4] Moreover, the Board will not instruct the ALJ to ignore allegations of wrongdoing against an applicant before him, or afford the applicant an opportunity to file an opposition here. Section 0.341(b) of the Commission's Rules, 47 CFR §0.341(b), provides that any question that would be acted upon by the ALJ if it were raised by the parties to the proceeding may be raised and acted upon by the ALJ on his own motion. We discern no significance in the fact that the allegations of wrongdoing were discovered by the ALJ rather than by one of the parties. The ALJ's ruling does not reflect, as claimed by Radio 1210, a conclusive predisposition to add the issue without a responsive pleading from Radio 1210, or to resolve such a potential issue adversely to the applicant. In any event, the addition of hearing issues is a matter specifically entrusted to the presiding ALJ, (*see* Section 1.243(k), 47 CFR §1.243(k); *Jan-Di Broadcasting, Inc.*, FCC 83R-14, released March 1, 1983); and by the same token, we believe it is for the ALJ in the first instance to determine what submissions, if any, shall be required. The Board has indicated repeatedly that it is loath to intervene in the interlocutory disposition of matters that are pending elsewhere, except in the most extraordinary circumstances. *See, e.g., Arcatel, Inc.*, 92 FCC 2d 893 (Rev. Bd. 1982). No extraordinary circumstances have been presented here and we presume that the ALJ will act expeditiously to either designate any necessary factual issues for hearing or, if appropriate, grant Radio 1210's application.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal From Memorandum Opinion and Order of Administrative Law Judge, filed October 4, 1983, by Radio 1210, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[4] By Summary Decision, FCC 83D-62, released November 4, 1983, the ALJ granted Central's motion and its application, and by *Memorandum Opinion and Order*, FCC 83M-4057, released November 7, 1983, the ALJ granted Radio 1210's motion but repeated his view that he could not grant the application because of the pending character allegations.

FCC 83D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
Central Pacific Broadcasting Corporation Rancho Mirage, California	MM Docket No. 83-785 File No. BP-811015AC
Radio 1210, Inc.[1] San Marcos, California	MM Docket No. 83-787 File No. BP-811015AO
For Construction Permit	

Appearances

Roger J. Metzler, Jr. on behalf of Central Pacific Broadcasting Corporation; and *James P. Riley, Thomas J. Dougherty,* and *Patricia A. Mahoney* for Radio 1210, Inc.[1,2]

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: November 2, 1983; Released: November 4, 1983

1. This is a ruling on an unopposed[3] Motion for Summary Decision that Central Pacific Broadcasting Corporation (Central) filed on October 18, 1983.

Background

2. The Chief, Mass Media Bureau designated this case for hearing on August 10, 1983. See 48 F.R. 37519 published August 18, 1983. He designated, *inter alia,* a financial qualification, and a contingent environmental impact issue against Central.

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[1] Radio 1210, Inc. is the successor to Robert A. Jones et. al. d/b/a North County Broadcasters.

[2] Although there was an areas and populations and a 47 USC 307(b) issues designated for hearing, the Mass Media Bureau hasn't participated in this proceeding so far.

[3] Any Comments on or Oppositions to Central's Motion were due on or before November 1, 1983.

3. On August 29, 1983, North County Broadcasting (North County) filed an engineering amendment that eliminated the mutual-exclusivity between it and Central's application. That amendment was accepted on September 13, 1983. See FCC 83M-3156.

4. Then, on September 12, 1983, Central proffered an amendment that, among other things, contained updated, financial data, and the environmental impact statement called for by the Designation Order. That amendment was accepted. See FCC 83M-3351, released September 23, 1983.

5. Central now moves for summary decision on the outstanding basic qualifying issues and asks that its application be granted. It contends that no genuine issues of fact remain on either the financial or the environmental impact questions.

Ruling

6. Central's Motion will be granted. It has demonstrated that it is financially qualified to be a Commission licensee, and by letter dated October 24, 1983, the Chief, Audio Services Division, indicated that Central's proposal is ". . .consistent with the National Environmental Policy Act, as implemented by Sections 1.1301 through 1.1319 of the Commission's Rules." And since Central is otherwise qualified to construct and operate as proposed (see para. 3 *supra.*, and 48 F.R. 37519 *supra.*, at para. 13), its application to operate on 1200 kHz, 1 kW, 5kW-LS, DA-2, U at Rancho Mirage, California, can be granted.

Findings of Fact and Conclusions of Law

7. Central has successfully met the two basic issues that remain against it. On the financial issue (Issue 1) it has a viable leasing arrangement with Continental Electronic Manufacturing for $176,516 worth of equipment; and it has $150,000 available to meet its remaining construction and operating expenses of $71,500.

8. On the environmental impact question the record shows that Central proffered the statement called for by the Hearing Designation Order (see 48 F.R. 37519 *supra.*, at paras. 6 and 17), and that the Chief, Audio Services has determined that Central's proposal is consistent with the National Environmental Policy Act as implemented by 47 CFR 1.1301-1.1319. Thus, Issue 4 poses no bar to granting Central's application.

SO the Motion for Summary Decision that Central Pacific Broadcasting Corporation filed on October 18, 1983, IS GRANTED; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion,[4] Central Pacific Broadcasting

[4] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Corporation's application for Rancho Mirage (File No. BP-811015AC), as amended, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

Reconsideration, Petition, for Denial of

Petition for reconsideration of *Clay Television, Inc.*, FCC 83R-80, 95 FCC 2d 1167 (1983), denied as moot.
—*Clay Television, Inc.*
BC Docket No. 81-690

FCC 84R-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Clay Television, Inc. Orange Park, Florida	BC Docket No. 81-690 File No. BPCT-801010KE
Orange Park Florida T.V., INC. Orange Park, Florida	BC Docket No. 81-692 File No. BPCT-801229KK
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1984; Released: April 19, 1984

BY THE REVIEW BOARD:

1. The Board has before it a petition for reconsideration of our *Decision*[1] in the above-styled case filed on November 14, 1983 by Orange Park Florida T.V., Inc. ("OPTV"); also before us are oppositions thereto filed by Clay Television, Inc. ("Clay"), to whom that *Decision* awarded the subject construction permit, and the Mass Media Bureau.

2. Apart from rearguing Clay's financial qualifications,[2] a matter we will not readdress,[3] OPTV's entire petition rests on an *Initial Decision*

[1] FCC 83R-80, released October 13, 1983, 95 FCC 2d 1167 (Rev. Bd.).

[2] OPTV Petition at 12-19.

[3] *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company* v. *FCC*, 351 F.2d 824 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966).

released on April 25, 1983[4] in the case of *Daytona Broadcasting Company, Inc.*, BC Docket No. 81-262 *et al.* It is explained that our prior *Decision* herein denied OPTV's application, in pertinent part, because OPTV had proposed a transmitter site that was substantially short-spaced with that of an earlier applicant in the *Daytona Broadcasting* case in contravention of §73.610 of the Commission's Rules[5] and had shown no public interest reason for a waiver.[6] OPTV argues that inasmuch as the *Initial Decision* awards that construction permit to an applicant with whom OPTV is not short-spaced, we ought undo our prior *Decision* herein or, at a minimum, await the resolution of *Daytona Broadcasting.*

3. In a *Decision* adopted this date in *Daytona Broadcasting,*[7] we reverse the *Initial Decision* on which rests the OPTV reconsideration request, and the award in that case is made to the applicant with whom OPTV was always short-spaced. Consequently, the OPTV petition is moot.[8]

4. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Orange Park Florida T.V., Inc. on November 14, 1983, IS DENIED; and

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[4] FCC 83D-27, released April 25, 1983 (ALJ), 97 FCC 2d 23b.

[5] 47 CFR §73,610. That rule requires that an application specify a site 55 miles distant from (a) an adjacent channel UHF station and (b) a previously filed adjacent UHF application. OPTV argues: "Until the Life Style application is out of hearing status, the spacing issue in this case will be subject to reveral, remand, and further hearings." OPTV Petition at 5. That, however, merely reinforces the wisdom of the §73.610 stricture against specifying a site short-spaced to a prior applicant.

[6] *Decision* at paras. 3-7. OPTV again contends that its superior comparative coverage warrants a waiver. However, as we noted: "[a]lmost any applicant could serve more people if it ignored our technical spacing requirements; that is no feat." *Id.*, at para. 7. *Compare Daytona Broadcasting, infra* note 7, where the winning applicant provides superior coverage *within* our spacing requirements.

[7] FCC 84R-23, Adopted April 13, 1984 (Rev. Bd.), 97 FCC 2d 12.

[8] Because of this mootness, we need not speculate on whether reconsideration would lie had our result in *Daytona Broadcasting* been otherwise. We point out, though, that we were aware of the Daytona Beach *Initial Decision* when we ruled the first time. *See* FCC 80R-80, *supra*, at n.3. And, as we explained in our prior *Decision* in this case, OPTV had ample notice of its short-spacing, other applicants found acceptable sites, and no public interest reason was offered for a waiver of §73.610 for OPTV's "substantial" short-spacing. *See Designation Order*, released October 2, 1981, at para. 3. Hence, OPTV has no equitable argument, even if our *Daytona Broadcasting* decision had gone another way; it merely gambled and lost. Nonetheless, we withheld action on OPTV's petition until our substantive disposition in *Daytona Broadcasting.* We regret that our procedural accommodation of OPTV has delayed the compliant applicant in this case as well as new television service to the people of Orange Park.

5. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Clay Television, Inc. on December 30, 1983, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Application, Amendment of, Effect of Delay in Filing
Disqualification Technical or Engineering
Diversification, of Control of Mass Media
Site Availability

Review Board affirmed grant of construction permit in comparative broadcast hearing, based on superior diversification of media control, where applicants have numerous other media interests. Third applicant disqualified because of lack of good cause for late engineering amendment and questioned reasonable assurance of site availability. Moderate demerit assessed on coverage map issue.
—*Colorado Television, Inc.*
BC Docket No. 80-466

FCC 84R-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Colorado Television, Inc. Denver, Colorado	BC Docket No. 80-466 File No. BPCT-790305LD
Oak Television of Denver, Inc. Denver, Colorado	BC Docket No. 80-467 File No. BPCT-790319LC
Alden Communications of Colorado, Inc. Denver, Colorado	BC Docket No. 80-468 File No. BPCT-790319LE
For a Construction Permit	

Appearances

Michael L. Glaser and *Francis E. Fletcher, Jr.*, on behalf of Colorado Television, Inc.; *B. Dwight Perry* and *Christopher C. Smallwood*, on behalf of Oak Television of Denver, Inc.; and *Jerome S. Boros* and *Peter Shuebruk*, on behalf of Alden Communications of Colorado, Inc.

DECISION

Adopted: July 27, 1984; Released: August 3, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Colorado Television, Inc. (CTI), Oak Television of Denver, Inc. (Oak), and Alden Communications of Colorado, Inc. (Alden) for authority to construct a new television station on Channel 20 at Denver, Colorado. By Hearing Designation Order, 45 Fed. Reg. 65310, published October 2, 1980, these applications (and one other that was subsequently dismissed at the applicant's request) were designated for hearing on a limited financial qualifications issue against CTI and on the standard comparative issue. Subsequently, presiding Administrative Law Judge Frederic J. Coufal (ALJ) granted summary decision in CTI's favor on the financial issue (Order, FCC 81M-581, released February 27, 1981) and added a false and misleading coverage map issue against CTI (Order, FCC 81M-582, released February 27, 1981). In addition, by Memorandum Opinion and Order, FCC 83M-2499, released July 28, 1983, the ALJ denied a CTI transmitter site amendment which attempted to cure defects in an earlier engineering amendment.

2. The Initial Decision (I.D.), FCC 83D-45, released August 3, 1983, disqualified CTI because of its lack of a viable transmitter site (citing FCC 83M-2499, *supra*)[1] and granted Alden's application. Noting that neither Alden nor Oak was entitled to any credit for integration of ownership into station management, the ALJ chose Alden because of superior credentials under the comparative rubric of diversification of media control, *i.e.*, he concluded that Oak's other media interests were more significant than Alden's and that Oak's "potential to present nondiversified points of view is greater . . . and so must be its demerit." *I.D.*, para. 30. The proceeding is now before the Review Board on exceptions and briefs filed by all of the applicants, reply briefs, and a plethora of amendments, "conditional petitions," "rejoinders," "comments," and other novel pleadings.[2] The

[1] The ALJ also assessed a moderate comparative demerit against CTI on the coverage map issue but did not include CTI in his overall comparative evaluation because of its disqualification. *See Louis Adelman, 28 FCC 432 (1960), aff'd sub nom. Guinan Realty Co.* v. *FCC*, 297 F.2d 782 (D.C. Cir. 1961).

[2] We will not dignify this pseudo-desideratum by separately listing its contents. While we note the court's injunction in *Martin-Trigona* v. *Smith*, 712 F.2d 1421, 1424 (D.C. Cir. 1983), that the rambling and confused pleadings of litigious *pro se* parties are entitled to patient analysis and reasoned decision, unauthorized or excessive plaints by counsel need

Board has reviewed the I.D. in light of these effusions, the oral argument held December 2, 1983,[3] and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his disqualification of CTI and grant of Alden's application.

3. We first turn to the question of CTI's basic qualifications to be a licensee. Central to this discussion is whether CTI had specified a viable transmitter site as of the time its application was denied;[4] otherwise, its application was substantially incomplete and patently not in accordance with the Commission's Rules, and CTI would be technically unqualified to be a Commission licensee. *See Shoblom Broadcasting, Inc.* (Shoblom II), 95 FCC 2d 44 (Rev. Bd. 1983). It appears that CTI had reasonable assurance of the availability of a site at least until June 14, 1982, when it was advised that its originally proposed site was no longer available. FCC 83M-2499, *supra*. Oak (which had the same site) notified the Commission on June 9, 1982 about the site's unavailability, advised the Commission on September 20, 1982 that it had located a new site, and filed an appropriate engineering amendment on October 5, 1982, which was unopposed and accepted by the ALJ by Order, FCC 83M-507, released February 10, 1983. In contrast, CTI first notified the Commission informally on July 6, 1982 that its site was no longer available, unsuccessfully attempted to negotiate with the site owner until August 3, 1982 to get that decision reversed, formally notified the Commission by amendment on August 4, 1982 that it had lost its site, and filed its first (defective) site amendment on August 20, 1982 and a second (corrective) amendment on March 30, 1983; after several rounds of objection-type pleadings, the first amendment was accepted by the ALJ and the second, rejected, on July 28, 1983 (FCC 83M-2499, *supra*).

4. In considering the acceptability *vel non* of CTI's August 20, 1982 and March 30, 1983 site amendments, the ALJ focused on the diligence and disruptiveness aspects of the established six-point test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970):

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not be similarly indulged. In the instant case, a Board request at oral argument on December 2, 1983 for supplemental briefs or transmitter site amendments (Tr. 1212) and an Order, FCC 84R-16, released March 1, 1984, requesting financial amendments, inadvertently contributed to the verbal deluge and muddied the waters of blame. But it is clear that the initiation of new television service to the public was delayed by the adversarial high (or low) jinks.

[3] We will deny Alden's April 20, 1984 petition for further oral argument. The pleadings adequately address all relevant considerations. *See, e.g., Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981).

[4] Because the ALJ did not disqualify CTI under the coverage map issue, we will address that matter after site availability.

> . . .the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

In FCC 83M-2499, *supra*, at para. 3, he concluded that the August 20 amendment was diligently filed whether as a reaction to the mid-June 1982 notification of the non-availability of CTI's original site or to the early August abandonment of site negotiations with the original site owner, and he accepted that amendment. However, CTI's amendment specified the wrong geographical coordinates for its new site (off by 400 feet) and, thus, while its accompanying petition purported to be specifying the exact same site as Alden, Alden disputed this assertion beginning with a September 13, 1982 petition to enlarge issues against CTI. It wasn't until January 5, 1983 (and after many pleadings) that CTI finally comprehended the nature of its error and undertook to file a corrective amendment. That amendment was filed on March 30, 1983. In rejecting the March 30 amendment as demonstrating "sufficiently egregious . . . nondiligence" to warrant CTI's disqualification, *id.* at para. 5, the ALJ characterized CTI's conduct between September 13 and January 5 as nondiligent "floundering" (*id.* at para. 4), emphasized that there was no explanation at all for the January 5-March 30 filing delay, and concluded that CTI had been nondiligent for at least six months out of the nine-month delay in the proceeding caused by its site loss. Hence, while conceding that acceptance of the March 30 amendment would not necessitate new hearing issues or otherwise delay the proceeding *any further*, the ALJ could not find good cause to accept the amendment, given the "equities of the situation," citing *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 49 RR 2d 1589 (1981).

5. Given the minor nature of the March 30 corrective amendment, rejection of it and the resulting disqualification of CTI solely on diligence grounds might be regarded as too draconian an application of the *Erwin O'Conner* test. *Compare Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 53 RR 2d 1175 (Rev. Bd. 1983), *rev. denied*, FCC 84-11, released January 17, 1984 (amendment curing erroneous geographical coordinates accepted; due diligence shown) *with Shoblom Broadcasting, Inc.* (Shoblom I), 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983) (site amendment rejected when proffered 20 months after notice that original site not available), *and California Broadcasting Corp.*, 90 FCC 2d 800, 809, 51 RR 2d 19539, 1546 (1982) (interval of more than six months before specifying substitute transmitter site not ordinarily due diligence). However, on January 13, 1984, Alden filed a "Supplement to Reply" which provides a powerful additional reason, and an independent basis, for

rejecting CTI's amendment. In that pleading, as amplified in a January 18, 1984 amendment "Opposition" and an April 20, 1984 conditional petition to enlarge issues, Alden alleges that CTI filed its August 20, 1982 and March 30, 1983 site amendments with full knowledge that on July 29, 1981 the U.S. Forest Service, which administers the site, had denied a use permit to CTI for location of a channel 20 television transmitter there, holding that "your proposed use is not compatible with existing and possible future uses of the site and will not be permitted" (Annex A, January 13, 1984 Supplement to Reply). Alden further alleges that this action by the Forest Service destroyed CTI's reasonable assurance of the site's availability, and that CTI's failure to report the denial and its claims of ignorance regarding the matter amount to misrepresentations and lack of candor with the Commission.

6. CTI's responses to these grave allegations are feeble. It does not deny the Forest Service's action, but asserts that the allegations are untimely and that CTI did not think it was necessary to report the permit denial because CTI's president and sole stockholder, Mr. John H. Gayer, did not believe that the denial was final—"[I]t was not at all clear that the site was not available . . ."—and because the ALJ "had already decided the Forest Service's prior approval was not necessary." CTI Opposition to Conditional Petition to Enlarge Issues, Affidavit of John H. Gayer, at 3. Because Alden first brought these matters to the Commission's attention on January 13, 1984 (within 30 days of discovering them), its allegations are timely, even though it took two further pleadings before they blossomed into a full-blown petition to enlarge issues.[5] We have previously cautioned against unreported "beliefs" or "confidence" that unavailable transmitter sites will become available, *see Valley FM Radio*, 93 FCC 2d 1330, 53 RR 2d 1195 (Rev. Bd. 1983), and do not regard Mr. Gayer's undisclosed optimism about the possibilities of Forest Service policy changes or reconsideration of the denial as an adequate basis for reasonable assurance of site availability.

7. Similarly, we reject CTI's fanciful interpretation of the ALJ's Memorandum Opinion and Order, FCC 81M-978, released April 3, 1981, in which he declined to add a site availability issue against *Alden*, holding that obtaining a use permit from the Forest Service was akin to a zoning matter, that he would not entertain speculation concerning whether Alden might be able to obtain a permit, and that "the availability *to Alden* of the . . . site is, so far as the Commission is concerned, anyone's guess" (emphasis added). *Id.* at para. 10. Endorsing the well-established Commission view that "zoning matters should be left to zoning authorities," the ALJ cited *Lester H. Allen*, 20 FCC 2d 480, 481 (Rev. Bd. 1969), which also

[5] Characteristically, in this proceeding, little was said once that could not be said thrice. See note 2, *supra*.

holds that "issues inquiring into such matters will not be specified absent a reasonable showing that the applicant will not be able to obtain approval of his plans from the local authorities." Under these circumstances it can hardly be argued that the ALJ would have blithely ignored evidence—had it been presented to him—that CTI's "zoning" request had already actually been denied by the Forest Service. His ruling rested on the assumption that no such zoning evidence existed as to Alden or any other applicant. While CTI did not have a duty to use its personal zoning denial as evidence *against Alden*, we do believe that it was obliged to accompany its own later attempts to specify Alden's site for itself with full disclosure of that prior zoning action. In other words, while the ALJ's ruling may be read to have relieved CTI from an obligation to obtain prior zoning *approval* from the Forest Service, it did not relieve it from disclosing prior zoning *disapproval* to the Commission. *Cf. Gainesville Media, Inc.*, 59 FCC 2d 382, 385, 37 RR 2d 178, 182 (Rev. Bd. 1976) (site availability issue would be added upon evidence of "actual reluctance" by zoning officials to sanction the site specified).

8. Now that CTI's past dealings with the Forest Service have come to light, we deem it appropriate to factor these revelations—which should have been made known to the ALJ—into the *Erwin O'Conner* analysis of CTI's March 30, 1983 amendment effort. We conclude that Alden's allegations raise serious questions about the reasonableness of CTI's assurance of its proposed site's availability and about whether it misrepresented or lacked candor concerning that availability. These questions would require the addition of site availability, misrepresentation, and candor issues against CTI and the remand of this proceeding for further hearing, both of which actions are incompatible with a good cause determination under *Erwin O'Conner*. Therefore, for these reasons as well as CTI's nondiligence, we affirm the ALJ's rejection of CTI's March 30, 1983 amendment and his subsequent disqualification of CTI. *See Shoblom I, supra.*[6]

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[6] The fact that, with the Board's tacit approval (see note 2, *supra*), CTI and the other applicants filed further site change amendments in December 1983 and January and February 1984 does not cure the good cause defects noted above. Because we have affirmed the rejection of its previous site amendment, CTI's January 9, 1984 petition for leave to amend must be denied and its site amendment, rejected. The chain of good cause has long since been broken, and CTI cannot build upon its shattered residue without passing through the hearing crucible. *Cf. Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 54 RR 2d 367 (Rev. Bd.), *recon. denied*, 95 FCC 2d 551 (Rev. Bd. 1983) (later financial amendment cannot substitute for previous amendment that lacks good cause for acceptance). Oak's December 20, 1983 site amendment and Alden's February 10, 1984 site amendment will be accepted since they lack CTI's *Erwin O'Conner* and *Coastal Bend* infirmities and are also substantively adequate.

9. Turning to the coverage map issue against CTI, the record reflects that from 1972 to 1978 CTI owned daytime AM Station KAAT, Denver, Colorado, and Mr. John Gayer was president and 50% stockholder. CTI Exh. 3 at 1-2. During this period, the ALJ found that KAAT used coverage maps commissioned and approved by Mr. Gayer which had three defects: they indicated a secondary service line to which KAAT could make no legitimate claim since Class II stations have no secondary service areas; a number of communities with populations exceeding 2500 persons were shown as being within KAAT's 0.5 mV/m primary service area but the applicable signal strength contour for primary service to those communities was 2.0 mV/m; and its sales materials did not indicate that KAAT was a daytime-only station. I.D., para. 21. The ALJ concluded that while "Gayer was not averse to overstating KAAT's case," I.D., para. 22, Gayer's actions warranted only a moderate comparative demerit against CTI and not its disqualification. In its exceptions, CTI argues that it should not receive any coverage map demerit because there is no evidence that Mr. Gayer intended to mislead or deceive either the public or advertisers with the indicated map defects and because, subsequent to the adoption of the I.D. herein, the Commission released a policy statement, *Unnecessary Broadcast Regulation*, 94 FCC 2d 619, 623, 54 RR 2d 705, 708 (1983), in which it announced that "misleading coverage claims are more appropriately explored and decided in other forums and will be so directed in the future." On the other hand, Alden urges that CTI should be disqualified under this issue or at least assessed a decisive comparative demerit because of Mr. Gayer's "willful, repeated, and continuing false coverage claims," his "guilty knowledge" concerning the map defects, and his "misrepresentations and lack of candor in his testimony and other statements to the Commission" in this proceeding. Alden Brief at 3, 23.

10. We will affirm the ALJ's conclusions on this issue and will neither disqualify CTI nor alter the moderate demerit assessed against it. A coverage map issue is an "accuracy issue," with the traditional concerns of full disclosure, materiality, and intent to deceive. *Cf. Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 50 RR 2d 1321 (Rev. Bd. 1981), *modified*, 53 RR 2d 44 (1983). Despite Alden's shrill rhetoric, the evidence in the instant case does not demonstrate the type of willful intent to deceive which would mandate CTI's disqualification. *Id.* Nor, on the other hand, may be casually gloss over the coverage map defects revealed herein as minor matters; they are typical of the species. *See, e.g., Town and Country Radio, Inc.*, 65 FCC 2d 694, 41 RR 2d 151 (Rev. Bd. 1977) (defects included secondary service line and incorrect primary service depiction; substantial demerit assessed). And we do not read the Commission's recent coverage map policy statement, *supra*, to retroactively nullify coverage map issues that are already *sub judice*. Where, as here,

such matters are properly presented to us, we must continue to apply established Commission policy, which emphasizes that full disclosure and candor concerning a station's coverage area, power, and other matters relating to audience potential are expected of licensees in their dealings with advertisers. *Promotional Practices of Broadcast Stations*, 34 RR 2d 741 (1975); *Universal Communications of Pittsburgh, Inc.*, 74 FCC 2d 617, 17 RR 2d 1262 (1969). However, noting that substantial demerits were assessed in *Town and Country Radio, Inc., supra*, and in *Gainesville Media, Inc.*, 72 FCC 2d 799, 43 RR 2d 604 (Rev. Bd. 1978), on coverage map issues, we nevertheless concur with the ALJ that the degree of culpability here is less than in those cases.[7] Instead, Mr. Gayer's conduct more closely resembles the "inattention rather than calculation" which resulted in the imposition of only a moderate comparative demerit on a promotional practices issue in *Key Broadcasting Corp.*, 60 FCC 2d 575, 577, 578 n.12, 38 RR 2d 105, 108, 109 n.12 (1976).

11. Having affirmed the disqualification of CTI, the comparative choice in this proceeding must be made between Alden and Oak, and the sole tool is the diversification of media control criterion of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). See paragraph 2, *supra*. In this exercise we are obliged to make *de novo* findings because it is conceded by all parties that the I.D. did not take into account all record data then available and because relevant media ownership changes have occurred subsequently.[8]

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[7] In *Town and Country, supra*, we concluded that the applicant's testimony on the issue bordered on misrepresentation, and in *Gainesville Media, supra*, the applicant's president and 33⅓% stockholder himself prepared the misleading materials. We defer to the ALJ's implicit credibility findings herein in Mr. Gayer's favor, *see New Continental Broadcasting Co.*, 88 FCC 2d 830, 840, 50 RR 2d 1117, 1126 (Rev. Bd. 1981), and affirm his refusal to weigh impeachment "evidence" offered for the first time in Alden's proposed findings without opportunity for cross-examination or explanation for its belatedness. Of course, this ruling (I.D., para. 24) did not prevent the ALJ from considering the alleged misrepresentations or lack of candor that Alden asserts permeated Mr. Gayer's actual hearing testimony. No germane adverse findings or conclusions were made.

[8] In light of the parties' litigiousness we have refrained from requesting a stipulation on relevant media interests. However, we note that Alden offered to enter into such a stipulation in a pleading filed June 7, 1984, and Oak did not respond. We may surmise that Oak's silence was calculated to preserve its exception and its separate petition for conditional enlargement of issues, filed May 17, 1984, both of which ask the Board—if Oak does not prevail on the record as it presently stands—to remand the proceeding to explore the effect on Alden's basic or comparative qualifications of its alleged failure to report in unambiguous form the full extent of its attributable media interests. Because the Board is not fully satisfied with either party's submissions concerning its media interests, it would not be equitable to launch such a one-sided inquiry. Therefore, we will decline Oak's remand invitation and proceed with our *de novo* analysis, giving

12. Alden is a Colorado corporation which is wholly owned by Alden Communications Corp., which in turn is wholly owned by Robertson Properties, Inc., which is wholly owned by Michael R. Forman, Alden's president. Alden Exh. 1. Hence, for diversification attribution purposes, we shall treat Mr. Forman as Alden's 100% owner. Mr. Forman has an *80% interest* in the permittee of a *Seattle, Washington television station* (August 2, 1982 amendment accepted by Order, FCC 82M-4138, released December 29, 1982); a *100% interest* in the permittee of a *Portland, Oregon television station* (September 8, 1982 amendment accepted by FCC 82M-4138, *supra*; January 19, 1984 amendment accepted by this Decision); and a *10% interest* in the permittee of a *Las Vegas, Nevada television station* (March 8, 1982 amendment accepted by Order, FCC 82M-2446, released August 11, 1982).[9] Mr. Forman also has operating control of the *19%* owner of *Oceanic Cablevision Corporation* which, in conjunction with a wholly-owned subsidiary, serves approximately 53,500 cable television subscribers on the island of Oahu, Hawaii. *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723-24 (Rev. Bd. 1983) (official notice taken pursuant to concession by Alden in June 7, 1984 Reply pleading, at 4, that "Alden may be chargeable with the interests set out in the Galveston record."). Finally, Mr. Forman is also the fifth or sixth largest motion picture exhibitor in the United States and through various companies *owns or controls* more than *300 motion picture theatres* in California, Arizona, Hawaii, Washington, Oregon, New York, New Jersey, Connecticut, Rhode Island, and Spain. *Old Time Religion Hour, Inc., supra*, at 723; CTI Exh. 5.

13. Oak is a Delaware corporation which is 95% owned by Oak Industries, Inc. and 5% owned by Great Lakes Broadcasting, Inc. Oak Exh. 1. Oak Industries or subsidiaries thereof have a *100%* interest in *Station WKID(TV), Fort Lauderdale, Florida* (Oak Exh. 2); a *100%* interest in *Station KBSC-TV, Corona, California* (Oak Exh. 2; May 10,

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appropriate consideration to all relevant information that has been brought to our attention or of which official notice may be taken.

[9] Alden also reported the ownership of a 15% interest in a television station on the island of St. Martin in the Netherlands Antilles. December 4, 1981 amendment accepted by FCC 82M-2446, *supra*. Because St. Martin is not a state, territory, or possession of the United States, it is not Commission policy to consider it under the diversification criterion. *See Theodore Granik*, 8 FCC 2d 1068, 1074 n.15, 10 RR 2d 659, 667 n.15 (Rev. Bd. 1967). For the same reason we shall give no weight to Alden's 80% interest in a variously-described VHF subscription television station or 300-subscriber cable television system located on the islands of Majuro and Ebye in the United Nations Trust Territory of the Pacific Islands (Marshall Islands). Tr. 301, 303-04, 325. This area has been administered by the United States, through the U.S. Department of the Interior, as a UN trust territory since 1947 and is not a state, territory, or possession of the United States; however, until the UN Security Council terminates the trusteeship, the U.S. will remain the administering power. *See* 1982 World Book Encyclopedia Yearbook 416-17 (official notice taken).

1983 amendment accepted by Order, FCC 83M-2521, released July 29, 1983), and an attributable *49%* interest in *Station WSNS-TV, Chicago, Illinois* (Oak Exh. 2).[10] In addition, Oak acknowledges its *100%* ownership of a *television translator station* for Station KBSC-TV, serving *Rancho Bernardo, Poway, and Escondido, California* (Oak Exceptions at 7; I.D., para. 28).[11] Finally, Oak acknowledges that it was the *100%* owner of a *25,000-subscriber* cable television system at *Oxnard, California* between February 1981 and February 1983 (Oak Exh. 2; February 23, 1981 amendment accepted by Order, FCC 81M-1518, released May 14, 1981; Tr. 1208; 1983 Broadcasting - Cablecasting Yearbook at D-30, cited in Alden Reply Br. at 23-24) and the *100%* owner of a *7837-subscriber* cable system at *Castro Valley, California* between July 1981 and August 1982 (August 30, 1982 amendment accepted by Order, FCC 82M-4140, released December 29, 1982; Tr. 1208; 1983 Broadcasting- Cablecasting Yearbook at D-23). As to Great Lakes Broadcasting, Inc., it is the 100% owner of the permittee of a *Gary, Indiana television station* (Oak Exh. 2), giving Oak a *5%* attributable interest.[12]

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[10] Because Oak is only 95% owned by Oak Industries, Oak's attributable interests in these media are 95%, 95%, and 47%, respectively.

[11] Oak also acknowledges controlling interests in the subscription television (STV) franchisees—but no ownership interests in the television licensees—of television stations at Fort Worth, Texas, Phoenix, Arizona, Minneapolis, Minnesota, and Baltimore, Maryland, as well as controlling interests in the STV franchisees for Oak's Fort Lauderdale, Corona, and Chicago television stations. In its exceptions, Oak argues that no account should be taken of any of its STV interests because the Commission has recognized that an STV proposal is merely a "program package," *Subscription TV Program Rules*, 85 FCC 2d 631, 637 n.9, 49 RR 2d 350, 354 n.9 (1981), and because the Commission has discarded its STV application requirements (now asking only to be notified when STV operations have commenced) and has adopted rules ensuring that station licensees rather than STV franchisees maintain ultimate programming control, *Subscription Television Service*, 54 RR 2d 1275 (1983); 47 CFR 73.642 (b) and (e). Furthermore, Oak maintains that it would be a form of "double jeopardy" (Br. at 6) to charge it with two media interests where it is station licensee and STV franchisee of the same television facility. We agree on both scores. The Board has previously held that program production companies will not be treated as communications media and will not be counted for diversification purposes absent a showing that interests in such companies undermine "maximizing available program services and viewpoints and preventing any undue concentration of economic power." *Morris, Pierce & Pierce*, 88 FCC 2d 713, 724, 50 RR 2d 959, 968 (Rev. Bd. 1981), *rev. denied*, FCC 83-31, released January 25, 1983. *Accord, Golden State Broadcasting Corp.*, 94 FCC 2d 212, 54 RR 2d 348 (Rev. Bd. 1983); *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206 (Rev. Bd. 1983). No such showing has been made here, and we are not prepared, absent Commission guidance on this novel question, to declare STV programming interests to be cognizable for diversification purposes as a matter of law.

[12] The ALJ did not attribute the Gary station to Oak, presumably because Great Lakes "would receive its 5% ownership only if a permit is granted Oak." I.D., para. 15 n.5. However, we have previously held that the other media interests of a proposed principal who has only an option to purchase an interest in the applicant will be counted for

14. Oak excepts to including its Corona station's translator or its previous cable television ownership among its media interests. It argues that the translator is "functionally merely an extension of [its Corona television station] and not an independent media voice," Br. at 7, and that its two-year cable television flirtation should be ignored because the two systems were acquired after the July 7, 1980 cutoff date for comparative upgrading (or downgrading) in this proceeding and were sold before the August 3, 1983 release date of the I.D. herein. We disagree. The inclusion of translators as media interests for diversification purposes has heretofore been accomplished without fanfare. *See, e.g., Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1333-36 (Rev. Bd. 1984). This should not be surprising in light of the status of translators as separately licensed broadcast stations designed to provide "television reception to the general public," 47 CFR 74.701(a), in "areas in which direct reception of . . . television . . . stations is unsatisfactory due to distance or intervening terrain barriers," 47 CFR 74.731(a). Under such circumstances, Oak's characterization of its translator as "merely" an extension of its station is unduly modest. And the fact that its translator may not originate any programming is not decisive. *Cf. Lorain Community Broadcasting Co.*, 14 FCC 2d 604, 606, 14 RR 2d 155, 158-59 (Rev. Bd. 1968) (cable television systems are treated as media of mass communications for diversification purposes regardless of whether they originate programming), *rev. denied*, 18 FCC 2d 686, 16 RR 2d 946 (1969), *aff'd sub nom. Allied Broadcasting Inc.* v. *FCC*, 435 F.2d 68 (D.C. Cir. 1970). However, this is not to say that translator ownership should necessarily be accorded major weight under the diversification criterion. As with all other media interests, the appropriate weight is directly related to size of ownership interest, proximity of media to applicant's proposed community of license, significance of media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective localities. *Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909; *cf. Gainesville Media, Inc.*, 72 FCC 2d 807, 812, 42 RR 2d 489, 497 (Rev. Bd. 1978) (300-subscriber cable system held *de minimis* media interest), *modified on other grounds*, 72 FCC 2d 795, 45 RR 2d 1621 (1979).

15. As to Oak's cable ownership argument, we recently emphasized in *Daytona Broadcasting Co., Inc., supra*, the inherent unfairness of media interest "upgrading" after the cutoff date for amendments as of right. At the time that Oak prepared Oak Exh. 2, which listed its Oxnard cable

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diversification purposes. *Radio Laredo, Inc.*, 87 FCC 2d 353, 362 n.14, 49 RR 2d 1489, 1495 n.14 (Rev. Bd. 1981), *rev. denied*, FCC 82-62, released February 3, 1982, *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v *FCC*, 696 F.2d 128 (D.C. Cir. 1982). We adhere to that judgment.

ownership (May 1981), it was (or should have been) fully aware of the potentially adverse diversification consequences of that ownership. *Lorain Community, supra.* For Oak not to be charged with the Oxnard and later Castro Valley cable interests because it fortuitously sold them prior to the ALJ's I.D. would be highly inequitable. As we have previously held in the context of an attempted post-cutoff upgrading of an ownership integration proposal, the status quo is fatally affected when the first post-cutoff event occurs (there, a departure of integrated owners); a later effort to cure the effects of the first event does not maintain or return the status quo, it is rather a voluntary upgrading of a deteriorated comparative position. *New Continental Broadcasting Co.*, 88 FCC 2d 830, 843-44, 50 RR 2d 1117, 1128 (Rev. Bd. 1981). To avoid being charged with these cable interests, Oak should have indicated at the time of acquisition that it would divest its cable interests prior to commencing operation of its proposed Denver station. *See Daytona Broadcasting Co., Inc., supra,* at 1335 n.24 (applicant will not be charged with principal's media interest as receiver of AM station because principal indicated *at the time he was appointed receiver* that he would divest himself of the interest if the application were granted); *cf. WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-14, 51 RR 2d 409, 419 (Rev. Bd. 1982) (divestiture commitment made prior to hearing designation avoids media attribution even if media not actually sold until after adoption of Initial Decision). Because Oak did not provide such a commitment, its two cable interests remain attributable to it. *Daytona Broadcasting Co., Inc., supra; Muncie Broadcasting Corp.*, 89 FCC 2d 123, 129-30, 51 RR 2d 46, 51 (Rev. Bd. 1982), *recon. denied*, 89 FCC 2d 1331, *rev. denied*, FCC 83-234, released May 19, 1983, and cases cited therein.

16. Recognizing that the relative distances of Oak's and Alden's media interests from Denver are a significant decisional element presently lacking in the record, we hereby take official notice of the following approximate mileage separations derived from the Rand McNally Road Atlas (Golden Anniv. Ed.): Las Vegas, 600 miles; Portland, 1000 miles; Seattle, 1050 miles; Oahu, Hawaii, 3300 miles;[13] Corona, 850 miles; Rancho Bernardo, Poway, and Escondido, 900 miles; Oxnard, 900 miles; Chicago, 900 miles; Castro Valley, 950 miles; Gary, 950 miles; and Fort Lauderdale, 1750 miles.

17. In performing the ultimate comparative diversification analysis we reject Oak's urgings that the comparison be based on the number of media outlets that each applicant controls. The *Policy Statement, supra,* demands a more sophisticated weighing of all of the factors discussed in paragraph 14, *supra.* Using that methodology, we note that Oak has very significant attributable ownership interests in three television stations

[13] Additional official notice, World Book Encyclopedia 9:23 (1977 ed.).

(Corona, Chicago, and Fort Lauderdale), compared to two television stations for Alden (Portland and Seattle).[14] We further note that Oak has a 95% attributable interest in two regional (California) cable television systems serving some 33,000 subscribers, compared to Alden's 19% attributable interest in a very distant (3300 miles away) cable system which serves some 54,000 subscribers. Both of these comparisons favor Alden because they show Oak's most significant media interests to be more numerous, closer (regional in the case of the Corona television and the cable television interests), and larger in terms of ownership percentage than Alden's. Finally, we note Alden's attributable movie theatre interests, compared to Oak's translator station. Although Oak maintains that substantial weight must be given to Alden's theatre interests, its argument rings hollow in light of recent precedent, including *Old Time Religion Hour, supra,* which considered and minimized the significance of Alden's very same theatre interests. *See Cascade Video of Oregon, Ltd.,* FCC 84R-49 at para. 11, released July 3, 1984 (Rev. Bd.); *Old Time Religion Hour, Inc., supra,* at 725; *Peoples Broadcasting Corp.,* 52 RR 2d 1617, 1630 (Rev. Bd. 1983), *rev. denied,* FCC 83-594, released December 15, 1983. None of Alden's movie theatres are even located in the state of Colorado, and Oak has not furnished any support for an economic diversity argument. Similarly, while we have taken due note of Oak's translator interest, we do not deem it decisionally significant here.

18. In close cases, comparative differences that might ordinarily appear slight loom larger. *See Birmingham Family TV, Inc.,* 91 FCC 2d 348, 354, 52 RR 2d 525, 529 (Rev. Bd. 1982). The preceding diversification analysis has furnished sufficiently large distinctions between Alden's and Oak's media interests to warrant awarding a slight diversification preference to Alden. *See Cleveland Television Corp.,* 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied,* FCC 83-235, released May 18, 1983, *aff'd sub nom. Cleveland Television Corp.* v *FCC,* No. 83-1659 (D.C. Cir. April 20, 1984). No other bases for comparison existing,[15] and all exceptions of decisional significance having been taken into account, we affirm the ALJ's ultimate conclusion that a grant of Alden's application will best serve the public interest, convenience, and necessity.

19. ACCORDINGLY, IT IS ORDERED, That Alden Communications of Colorado, Inc.'s petitions for leave to amend filed on August 10 and 29, September 6, and October 12 and 31, 1983, and on January 19, February 8

[14] Oak's 5% interest in a Gary television station essentially balances Alden's 10% interest in a Las Vegas station. The differences are not decisionally significant. *See Ottumwa Broadcasting Co.,* 92 FCC 2d 1011, 52 RR 2d 1447 (Rev. Bd. 1982).

[15] We reject out of hand Oak's contention that it deserves a minority ownership preference because its unintegrated 5% owner, Great Lakes Broadcasting, Inc., is 100% minority-owned (Oak Exh. 1). *See WPIX, Inc.,* 68 FCC 2d 381, 411-12, 43 RR 2d 278, 315-16 (1978) (minority enhancement credit may only be awarded to integrated minority owners).

and 10, March 28, April 2 and 30, May 31, and June 29, 1984 ARE GRANTED, and the amendments ARE ACCEPTED; and that its January 13, 1984 petition for leave to file supplement IS GRANTED;

20. IT IS FURTHER ORDERED, That Alden Communications of Colorado, Inc.'s April 17, 1984 motion to reject Colorado Television, Inc. petition for leave to amend, its April 20, 1984 petition for oral argument and conditional petition to enlarge issues against Colorado Television, Inc., and its May 8, 1984 conditional petition to enlarge issues against Oak Television of Denver, Inc. ARE DENIED;

21. IT IS FURTHER ORDERED, That Oak Television of Denver, Inc.'s petitions for leave to amend filed on December 20, 1983 and on March 30, April 18, and July 2, 1984 ARE GRANTED, and the amendments ARE ACCEPTED;

22. IT IS FURTHER ORDERED, That Oak Television of Denver, Inc.'s April 18, 1984 motion for summary decision and disqualification against Colorado Television, Inc. and May 17, 1984 petition for conditional enlargement of issues against Alden Communications of Colorado, Inc. ARE DENIED;

23. IT IS FURTHER ORDERED, That Colorado Television, Inc.'s petition for leave to amend filed on January 9, 1984 IS DENIED, and the amendment IS REJECTED;

24. IT IS FURTHER ORDERED, That Colorado Television, Inc.'s petitions for leave to amend filed on April 2 and May 14, 1984 ARE GRANTED, and the amendments ARE ACCEPTED;

25. IT IS FURTHER ORDERED, That Colorado Television, Inc.'s September 27, 1983 motion to strike IS DISMISSED as moot, and its May 15, 1984 motion to accept late pleading IS GRANTED; and

26. IT IS FURTHER ORDERED, That the application of Alden Communications of Colorado, Inc. (File No. BPCT-790319LE) for authority to construct a new television station at Denver, Colorado, IS GRANTED, and the applications of Colorado Television, Inc. (File No. BPCT-790305LD) and Oak Television of Denver, Inc. (File No. BPCT-790319LC) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-45

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Colorado Television, Inc. Denver, Colorado	BC Docket No. 80-466 File No. BPCT-790305LD
Oak Television of Denver, Inc. Denver, Colorado	BC Docket No. 80-467 File No. BPCT-790319LC
Alden Communications of Colorado, Inc. Denver, Colorado	BC Docket No. 80-468 File No. BPCT-790319LE
For a Construction Permit	

Appearances

Michael L. Glaser, Scott Johnson, and *Francis E. Fletcher, Jr.* on behalf of Colorado Television, Inc.; *Christopher C. Smallwood, James A. Treanor III,* and *John R. Feore, Jr.* on behalf of Oak Television of Denver, Inc.; *Jerome S. Boros, Zave M. Unger,* and *Irving V. Gastfreund* on behalf of Alden Communications of Colorado, Inc.; and *Charles E. Dziedzic* and *Edythe S. Wise* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

Issued July 27, 1983; Released August 3, 1983

Preliminary Statement

1. This proceeding now involves the applications of Colorado Television, Inc. (CTI), Oak Television of Denver, Inc. (Oak), and Alden Communications of Colorado, Inc. (Alden) to establish a new television

station on channel 20 at Denver, Colorado.[1]

2. By *Hearing Designation Order*, BC 35496, released September 22, 1980 (45 Fed. Reg. 65310), the following issues were specified with respect to the present applicants:

> 2. To determine with respect to Colorado Television, Inc.:
>
> (a) the source and availability of additional funds over and above the $72,643 indicated; and
>
> (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Summary decision was granted in favor of CTI on issue 2 (FCC 81M-581, released February 27, 1981). A coverage map issue was specified against CTI (FCC 81M-582, released February 27, 1981):

> To determine whether CTI principal John H. Gayer, participated in the preparation and use of false misleading coverage maps in his capacity as chief executive of Station KAAT, Denver, Colorado, and, if so, to determine the effect thereof on the applicant's basic and/or comparative qualifications to be a Commission licensee.

4. Prehearing conferences were held on January 13, 1981, February 18, 1981, and February 26, 1981; an admissions session was held on May 26, 1981; evidence was taken on June 2-4, 1981 and on July 1-2, 1981. The record was closed on July 27, 1983.

Findings of Fact

5. John H. Gayer is an electrical engineer. In the early 1950s, he was a radio engineering consultant in Washington, D. C. He then served for 12 years as a member of the International Frequency Registration Board of the International Telecommunications Union with responsibility for broadcasting activities in radio regulation and the development of telecommunications systems (CTI Ex. 2).

6. On February 24, 1970 Gayer, then a 50% stockholder in CTI, executed an application on its behalf, for a Class II, 50 kW, directional, daytime, AM station in Denver on 1090 kHz, a "clear channel" frequency. CTI retained Peter V. Gureckis, a consulting engineer, to prepare the engineering portion of the application. As filed with the Commission, it included various coverage contours for the proposed station but no reference was made to a 0.1 mV/m contour because the Commission's rules recognized no such coverage for Class II stations (Tr. 478, 481-482).

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[1] When designated, the proceeding involved a fourth applicant, American Television and Communications Corporation; that application was later dismissed (FCC 81M-3427).

The application was granted and the call letters KAAT were assigned to the station (CTI Ex. 3).

7. Gayer authorized the preparation of promotional material including a coverage map (Tr. 825-826, 956, 962; Alden Exs. 7 and 12). He asked Gureckis to prepare the map (CTI Ex. 3). Gureckis told Gayer that the map would depict a 0.5 mV/m contour labeled "primary" and a 0.1 mV/m contour labeled "secondary." He had prepared coverage maps in that manner for years (Tr. 475-476).[2] Gayer understood the term "secondary" to describe an area subject to interference and fading (Tr. 664). Gureckis sketched both 0.5 mV/m and 0.1 mV/m contours on a large United States Geological Survey map labeling the contours "Primary (0.5 mV/m)" and "Secondary (0.1 mV/m)." He made no other markings on the map except to provide a mileage scale. The names of cities were already on the map (Tr. 472-475). He submitted the map to Gayer in October 1972 (Alden Ex. 9).

8. When Gayer received the Gureckis map he compared it to the application and it seemed in order (Tr. 590-607).[3] At that time no studies had been conducted respecting the station's signal intensity, interference, fading or the noise level beyond the 0.5 mV/m contour. KAAT's regular operation commenced in December 1972 following the coverage map's preparation. Measurements were not taken until after the station went on the air (Tr. 523-526, 614, 625-626). From 1973-1977 Gayer monitored the station in various locations to the north and east and found that the coverage map was accurate (CTI Ex. 3).

9. The coverage map prepared from the Gureckis map included Denver and certain surrounding areas including parts of the states of Wyoming and Nebraska. Two concentric ovals are depicted; the inner oval is labeled "Primary (0.5 mV/m)" and the outer oval is labeled "Secondary (0.1 mV/m)." The map showed 12 cities located between the 0.5 mV/m contour and the 0.1 mV/m contour (CTI Ex. 3, Att. A, Att. B). Those cities were: Laramie, Torrington, and Wheatland, Wyoming; Scottsbluff, Sidney, Ogallala, and Kimball, Nebraska; Leadville, Glenwood Springs, Aspen, and Steamboat Springs, Colorado; and St. Francis, Kansas.

10. The map was included on approximately 6,000 to 10,000 rate cards. The cards were given to KAAT sales personnel for distribution to advertisers and advertising agencies. The coverage map was also sent to Savalli/Gates, KAAT's national sales representatives (Tr. 626-628). Gayer testified that use of the rate card was limited to three months from December 1972 to February 1973, when the station ran out of cards. But salesmen continued to carry copies (Tr. 708-709).

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[2] He stopped the practice after a case in Virginia questioned the practice (Tr. 475).

[3] Gayer preferred the Gureckis map to the maps in the application for promotional purposes because it was simpler (Tr. 586).

11. KAAT distributed material emphasizing its 50,000 watts of power without indicating its daytime only status (Alden Exs. 7, 11, 12; Tr. 710). It also referred to its "Rocky Mountain region" coverage (Alden Ex. 7). For six months in 1975, KAAT's advertisement in *Spot Radio Rates and Data* was (Alden Exs. 8, 16):

> The Big KAAT of the Rockies
> Recreation Radio
> 50,000 Watts
> 7-State Coverage

Gayer said the ad was a mistake by a salesman and that he canceled the ad when he learned of it (Tr. 630-636). He was surprised to learn the ad ran for so long (Tr. 641). Other copy in the ad was changed on two occasions during the six-month period (Alden Ex. 16).[4] In 1976-1977 KAAT distributed a brochure alleging that KAAT reached into seven adjacent states and did not mention that it was a daytime only station (Alden Ex. 17).

Comparative Issue

CTI

12. CTI is a Colorado corporation with stockholders, directors, and officers as follows (CTI Ex. 1):

Name	*Director*	*Office Held*	*Ownership*
John H. Gayer	Yes	President Treasurer	100%
George A. Codding	Yes	Secretary	0
Syl Morgan Smith	Yes	Manager	option to purchase 10%
Minnie Tomocich	No	Asst. Secretary & Business Manager	0

13. Gayer will be responsible for the general management of the station and will spend 20 hours per week to that end (CTI Ex. 2).

14. Gayer has been in broadcasting since 1969 as owner and managing officer (CTI Ex. 2). During the years 1972 to 1978 Gayer was an officer, director, and stockholder of Big County Radio, Inc. which has operated an FM station in Steamboat Springs, Colorado, since 1973 and an AM station since 1974 in the same location (CTI Ex. 2). Gayer no longer is a stockholder in Big County, but his wife is a 31.5% stockholder and an officer and director (Tr. 377-378, 449-450). Gayer has lived in Denver since 1972, has been a member of the Denver Chamber of Commerce and Denver Rotary Club for nine years; he is an advisory board member and

[4] Relating to personnel changes in September and October 1975.

lecturer at the Institute of Telecommunications at the University of Colorado at Boulder (CTI Ex. 2).

Oak

15. Oak is a Delaware corporation with stockholders, directors, and officers as follows (Oak Ex. 1; Oak petitions for leave to amend filed July 20, 1981, August 14, 1981, and February 23, 1983):

Name	*Director*	*Office Held*	*Ownership*
Everitt A. Carter	Yes	None	0
John P. Gwin	No	Chairman President	0
William Guerra	Yes	Vice President	0
Eugene M. Keys	Yes	Vice President	0
Ronald S. Comm	Yes	Treasurer	0
E. Jeanne Hamm	No	Secretary	0
Oak Industries Inc.	No	None	95%
Great Lakes Broadcasting, Inc.	No	None	5%[5]

16. Oak proposes no integration and has no media interests, but its parent, Oak Industries Inc., or subsidiaries thereof, owns (Oak Ex. 2, Oak petition for leave to amend filed May 10, 1983):

(a) the licensee of WKID(TV), Fort Lauderdale, Florida;

(b) STV franchise for WKID(TV);

(c) the licensee of KBSC-TV, Corona, California;

(d) STV franchise for KBSC-TV;

(e) 24.5% interest in the joint venture and 49% of a 50% joint venturer in WSNS-TV, Chicago, Illinois;

(f) 50% in the STV franchise holder for WSNS-TV.

Alden

17. Alden is a Colorado corporation with stockholders, directors, and officers as follows (Alden Ex. 1):

[5] According to an Oak petition for leave to amend filed October 26, 1981, Great Lakes Broadcasting, Inc. would receive its 5% ownership only if a permit is granted Oak. It is minority owned (Oak Ex. 1).

Name	*Director*	*Office Held*	*Ownership*
Michael R. Forman	Yes	President	0
Jerome A. Forman	Yes	Vice President	0
James J. Cotter	Yes	Vice President	0
Ted Minsky	No	Vice President	0
John E. Bogardus	No	Secretary	0
Constantine Hambas	No	Treasurer	0
Alden Communications Corp.	No	None	100%

18. Alden Communications of Colorado, Inc. is owned by Alden Communications Corp. which is wholly owned by Robertson Properties, Inc., which is wholly owned by Michael R. Forman (Alden Ex. 1). Michael R. Forman and Ted Minsky are the only two Alden officers who propose to be active in Alden management; the participation by each is not claimed to equal 20 hours per week (Tr. 310, 337).

19. Forman, a resident of California, has an interest of 8.67% or less in each of several companies which exhibit motion pictures. These companies exhibit on 300 to 350 screens (as opposed to theaters) in California, Arizona, Hawaii, Washington, Oregon, New York, New Jersey, Connecticut, Rhode Island, and Spain (CTI Ex. 5). Although the companies could refuse to show a picture for any reason, social comment included, they have never rejected the showing of a picture for any reason except for excessive sex or violence (Tr. 319-321, 330). Forman also owns indirectly about 8.5% in a company which owns about 19% of the stock in a CATV operation in Hawaii (Alden Ex. 3) and 65% to 80% of a VHF TV station in the Marshall Islands.

20. Ted Minsky, who resides in California, is an officer and director in various corporations involved in motion picture exhibition and is a director of a CATV operation in Hawaii (Alden Ex. 4).

Conclusions of Law

Rate Card Issue

21. KAAT used a coverage map for sales purposes which indicated a secondary service line to which KAAT could make no legitimate claim. Class II stations have no secondary service area. See 47 C.F.R. 73.11 and 73.21. The maps were misleading in two other respects:

(1) a number of communities were shown in the primary service area (0.5 mV/m) which have a population in excess of 2,500 persons;[6] a signal strength of at least 2.0 mV/m is required for primary service to such communities. See 47 C.F.R. 73.182(g);

(2) the rate card bore no suggestion that KAAT's coverage was daytime only.

[6] Official notice is taken of the pertinent population.

22. In order to justify the claim of coverage to the secondary area, Gayer testified that he checked the station's signal and knew that there was such coverage. He said that he relied on Gureckis for map preparation and Gureckis testified that he followed what he then believed to be common practice in the preparation of promotional coverage maps. The evidence is clear however, that the rate cards were prepared and some were distributed prior to the field checking that supported the conclusion that the coverage claims were accurate. The evidence respecting the seven-state coverage claim (in the SRDS ads and a year or so later in the promotional brochures) lends credence to the view that Gayer was not averse to overstating KAAT's case.[7] The omission of the "daytime only" *caveat* on the map tends to support this view though it is difficult to believe Gayer could have intended to successfully hide the fact.

23. The degree of culpability here is less than in *Town and Country Radio, Inc.*, 65 FCC 2d 694, or in *Gainesville Media, Inc.*, 59 FCC 2d 913, in each of which the Review Board refused to disqualify an applicant on a coverage map issue. The action of Gayer in the KAAT matter is chargeable as a moderate comparative demerit.

24. In its proposed findings and conclusions, Alden argues that certain pre-trial affidavits executed by Gayer should be noticed and considered as evidence against CTI's claims respecting the issue at hand and, independently, as evidence of CTI's unfitness to be a licensee. These affidavits, which were not offered during the hearing, are sufficiently at odds with Gayer's testimony, it is said, to require CTI's disqualification even though there is no issue respecting them. The customary way to use a witness' prior statements perceived to be inconsistent with his current testimony, is to confront the witness with the statements during cross-examination. The obvious virtue of this procedure is that it gives the witness a chance to explain any apparent discrepancy. To use them now, without giving the witness a chance to explain, is offensive to the due process which the customary practice provides. To recall the witness now, for confrontational purposes, requires a showing by the cross-examiner why this could not have been done earlier. That showing has not been made.

Integration

25. Neither Oak nor Alden claims integration credit (Alden proposed findings, p. 30; Oak proposed findings, p. 22). CTI claims 100% integration of its sole stockholder on a part-time (20 hours) basis. CTI has a substantial credit for the integration of its 100% owner on a part-time basis quantitatively enhanced by his Denver residence and his past broadcast experience in the Denver market. No enhancement is credited for membership in two civic groups and the communications teaching

[7] There is no issue relating to these matters. They tend to show Gayer's state of mind.

position because there was no showing of what those matters have entailed.

Diversification

26. CTI must be charged with 31.5% ownership interest of the wife of its only stockholder in the licensee of AM and FM stations in Steamboat Springs, Colorado. See *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2139. CTI argues that the record shows no relationship between Gayer and his wife supporting an assumption of common control between spouses. *Klein* indicates that there is a presumption of common control between spouses; it was up to CTI to rebut the presumption if it could. There is no evidence that Steamboat Springs is in the same service area as that proposed by CTI for Denver.

27. Alden must be charged with its parent's interests in many motion picture outlets. Under *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, such outlets are media of mass communications. Alden must also be charged with its parent's interest in a cable system in Hawaii and a television station in the Marshall Islands. But the interest of Alden's parent in most of these is small—less than 9% in each instance except for the Marshall Islands venture in which it has a strong majority ownership.

28. Oak's chargeable interests are 100% of a Florida television station and a California television station, 49% of a television station in Chicago, interests in the STV franchises relating to the foregoing stations, and a California translator.

Ultimate Conclusions

29. In a Memorandum Opinion and Order issued July 27, 1983, CTI's petitions for leave to amend to specify a new transmitter site were denied. This effectively leaves CTI without a viable application and its application cannot be further considered in this process.

30. Neither Alden nor Oak is entitled to any integration credit. The deciding factor is whether Alden's quite small interest in a great number of motion picture outlets, a small interest in a cable system, and a large interest in one TV station or Oak's 100% interest in two TV stations and about half of another as well as similar interests in STV franchises and a translator station earns the greatest demerit. Oak's potential to present nondiversified points of view is greater (though not great) and so must be its demerit.

Accordingly, IT IS ORDERED that the application of Alden Communications of Colorado, Inc., for a construction permit for a television station on channel 20 at Denver, Colorado IS GRANTED and that the applications of Colorado Television, Inc. and Oak Television of Denver,

Inc. ARE EACH DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL, *Administrative Law Judge*

[8] If exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Common Carrier
International Maritime Satellite Communications

Commission granted authority to Communications Satellite Corporation to participate in INMARSAT's first generation satellite program to lease satellite capacity in order to provide global maritime telecommunications service.
—*COMSAT*

FCC 84-248

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Communications Satellite Corporation's Application for authority to participate in the first generation satellite program of the International Maritime Satellite organization (INMARSAT).	File No. CSS-81-001-P

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted May 25, 1984; Released June 11, 1984

BY THE COMMISSION:

1. The Commission has before it an application filed by the Communications Satellite Corporation, (Comsat), pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act, 47 U.S.C. Section 753(c) (1983), and Sections 214, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 214, 309, and 319 (1983), for authority to participate in the first generation satellite program of the International Maritime Satellite Organization, (INMARSAT), to provide a global maritime communications system.

2. Comsat filed the application on November 5, 1980 and amended it on April 17, 1981. Comsat continued to supplement the application on April 23, 1982, February 4, 1983, and November 7, 1983, to inform the Commission of changes in the program. The application is unopposed and no comments were filed.

I. Background

3. In its initial filing, Comsat described INMARSAT's Baseline plan for its first generation satellite program. The Baseline plan provided operational and spare satellite capacity in the Atlantic, Pacific and Indian Ocean regions (hereinafter referred to as "AOR", "POR" and "IOR" respectively). INMARSAT planned to lease the full satellite capacity of the MARECS-A and MARECS-B satellites from European Space Agency (ESA)[1]; the full satellite capacity of the INTELSAT-V MCS-A, MCS-B and MCS-C satellites from the International Telecommunications Satellite Organization (INTELSAT)[2]; and the full satellite capacity of the MARISAT F-2 satellite from the MARISAT Joint Venture.[3] Maritime communications service would be provided in the AOR, by the MARECS A and MCS-B satellites; in the POR, by the MARECS-B and MARISAT-A satellites; and in the IOR, by the INTELSAT-V MCS-A and MCS-C satellites. In addition, the Baseline plan had available seven options through which INMARSAT could continue to provide service in the event of satellite failure.[4]

4. Due to delays in the availability of satellites for the Baseline plan, INMARSAT developed a Transition plan for providing service until the Baseline plan could be implemented. To meet its scheduled service date of February 1, 1982, INMARSAT leased three MARISAT satellites, the F-1, F-2 and F-3, one in each ocean region.[5] The Commission authorized Comsat's participation in INMARSAT's transition plan on February 8, 1982.[6]

5. As evidenced by Comsat's several supplements, INMARSAT continued to reassess the Baseline plan, and modified it several times in response to changed circumstances. The Baseline plan thus evolved into the present system, the Baseline Plus ("+") plan, which is essentially a combination of the Transition plan and the original Baseline plan. The Baseline + plan consists of leases for three MARISAT satellites, two

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[1] The two MARECS satellites are the only satellites leased which can be relocated to another ocean region should the need arise.

[2] The INTELSAT-V series F-5 through F-9 satellites carry a package called the Maritime Communications Subsystem (MCS) which provides maritime communications service. INTELSAT leases the MCS package to INMARSAT.

[3] There are three MARISAT satellites, the F-1, F-2 and F-3, which are owned by the MARISAT Joint Venture, a group composed of Comsat General and three other U.S. carriers. The Joint Venture developed MARISAT, a maritime satellite system, to provide service to the U.S. Navy, as well as maritime telephone and telex services to commercial shipboard users. The program ended with the transition to the INMARSAT system in February of 1982.

[4] Details of the Baseline Plan and its seven options are set forth in an Appendix, A-1.

[5] Details of the Transition Plan are set forth in an Appendix, A-2.

[6] Memorandum Opinion, Order and Authorization, Communications Satellite Corporation, Mimeo No. 30831 (released February 8, 1982).

MARECS satellites and four INTELSAT-V MCS satellites. In the AOR, the MARECS A is the operational satellite with the MCS-B satellite providing spare satellite capacity. In the IOR, the MCS-A is the operational satellite with the MCS-C satellite providing spare satellite capacity. In the POR, the MARISAT F-3 is the operational satellite until the MARECS B-2 satellite takes over as the operational satellite on January 1, 1985, and sometime before December 31, 1985 an MCS satellite is scheduled to provide spare satellite capacity.[7]

6. Except for the MARISAT lease agreements, INMARSAT entered into long-term lease arrangements to ensure the operational integrity of its system until the second generation satellite program is implemented. The MARECS A and MARECS B-2 satellites are leased as a package from ESA, at a total cost of $64.4 million for 10 years, with an option to extend the lease four additional years.[8] Moreover, the agreement establishes January 1, 1985, as the MARECS B-2 satellite's ready for service date. Since both MARECS satellites are leased for 10 years, they will provide maritime communications service for INMARSAT through 1989.

7. The INTELSAT-V MCS-A, MCS-B and MCS-C satellites are also leased as a package. These satellites are leased from INTELSAT for seven years at a cost of $5 million per satellite per year. All three MCS satellites, however, have a generic defect which causes intermittent noise increases in the L-to-C transponders during transmission of information. The problem appears to be connected with the traffic load, and thus an adverse effect on traffic is expected to increase as the traffic grows. Much of the information about the problem has been obtained from studying the MCS-A satellite in the IOR because it is the one MCS satellite providing operational satellite capacity. Since the MARECS A satellite is the operational satellite in the AOR and the MCS-B satellite only provides spare satellite capacity, the impact of the defect in the AOR is reduced. The defect has been found to effect both voice calls and analog and digital transmission. During the periods of increased noise, request messages originated by the ships will be lost and bursts of errors will occur on telex transmissions and on all data transmission (i.e., voice band data, high

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[7] The lease of a fourth MCS satellite to be placed in the POR is the result of negotiations between INMARSAT and INTELSAT of a dispute over the MCS-D satellite. INMARSAT contends that it exercised an option to have the MCS-D satellite placed in the POR at $3.0 million per year for seven years in 1982. This option was one of the original seven options for the Baseline plan. *See* Appendix 1. INTELSAT, however, contends that the option was subject to certain conditions, and INTELSAT's obligation to place the MCS-D satellite in the POR was alleviated when these conditions arose. The MCS-D satellite was deployed to the AOR in February, 1984.

[8] The MARECS B-2 satellite is a replacement for the MARECS B satellite which failed during launch. The failure of the satellite required the lease arrangement between INMARSAT and ESA to be renegotiated to its present terms.

speed data (HSD) and very high speed data (VHSD)). Because of the high frequency of occurrence of the noise observed on the MCS-A satellite, INMARSAT is doubtful whether it can offer high speed or very high speed service on the MCS satellites. To compensate for the defect, INMARSAT has negotiated with INTELSAT for a 20% reduction in the lease charges, which sets the yearly charge at $4.0 million per satellite. In addition, the MCS-C satellite has a further defect which causes an intermittent reduction in the gain of the C-to-L transponder. To compensate for this defect, INMARSAT negotiated an additional $.4 million rebate on the lease charge for as long as the MCS-C satellite exhibits the gain variation. Also in the agreement, INMARSAT agreed to waive any right it had to terminate the leases of the MCS satellites because of the defects. Furthermore, INMARSAT leased a fourth MCS satellite from INTELSAT who agreed to provide a satellite in the POR no later than December 31, 1985, at $4.4 million per year. INMARSAT also has the option of getting the MCS satellite in the POR in January, 1985 or July, 1985, at additional cost and subject to certain conditions.[9] Moreover, INMARSAT has no guarantee that the fourth MCS satellite will not have the same defect as the other MCS satellites. Therefore, although the defects affect the quality of service, INMARSAT will continue to use the MCS satellites and lease a fourth one until the second generation satellite program is implemented sometime in mid-1988.[10]

8. The MARISAT satellites, on the other hand, were leased individually for short periods of time because originally they were only to be used to provide satellite capacity until other satellites became available. The MARISAT F-1 satellite in the AOR was leased from February 1, 1982 to December 31, 1983, when it was replaced by the MARECS A satellite. The MARISAT F-2 satellite in the IOR was leased from February 1, 1982 to February 29, 1984, when it was replaced by the MCS-C satellite; and the MARISAT F-3 in the POR is leased until January 31, 1985, when it is scheduled to be replaced by the MARECS B-2 satellite. INMARSAT, however, has an option to extend the lease of the MARISAT F-3 satellite

[9] If INMARSAT exercised its early option dates, the lease of the fourth MCS satellite would be $7.4 million for a January 1, 1985 ready for service date, and $5.9 million for a July 1, 1985 ready for service date. INMARSAT can only exercise the early deployment option if: 1) the INTELSAT-V F-8 is used successfully for non-MCS purposes; 2) INMARSAT notifies INTELSAT by August 1, 1984 for the January 1, 1985 ready for service date and by December 1, 1984 for the July 1, 1985 ready for service date; and 3) INTELSAT has no more than one launch failure with the INTELSAT-V F-9, F-10 and F-11 satellites, and no more than one satellite malfunction which renders a satellite unusable in 1984.

[10] This agreement struck between INMARSAT and INTELSAT still must be approved by INMARSAT at its July 1984 meeting. INTELSAT approved the agreement at its March, 1984 meeting.

beyond January 31, 1985 if the need arises. Due to the defects in the MCS satellites, INMARSAT has negotiated with Comsat General option rights to extend the MARISAT F-1 and F-2 leases for up to four additional periods of three months beginning February 1, 1984, at a cost of $100,000 for each option period. These options could be exercised, if operational difficulties with existing space segment arise, at a lease cost of $292,000 and $167,000 per month for the AOR and IOR satellites respectively, less an initial credit of $100,000, the cost per each option period, per quarter. The total cost for the leases of the three MARISAT satellites including the new option, is $12.7 million. This figure may increase if INMARSAT exercises the option or extends the MARISAT F-3 satellite lease beyond January 31, 1985.

9. In its supplement filed on April 23, 1982, Comsat estimated that the capital investment required for the first generation satellite program was $227 million, with Comsat's share of the total cost approximately $61.8 million, based on a 27.2% ownership share of INMARSAT.[11] In the most recent filing on November 7, 1983, however, Comsat's ownership share of INMARSAT was reduced to 23.35%, and the lease of the MARECS satellites was established at $13.9 million less than the $78.4 million amount estimated in the April 23, 1982 supplement. In addition, INMARSAT recently negotiated an option to lease the MARISAT satellites with Comsat General, and a reduction in the lease charges for the defective MCS satellites with INTELSAT. The total cost of the first generation satellite program is $236.6 million and Comsat's share of that cost is $54.3 million.[12]

10. In its application and supplements, Comsat argues that the Baseline + plan represents an operationally sound approach to the implementation of a global maritime communications system. Comsat notes that the plan provides operational and spare capacity in the AOR and the IOR, currently, and in the POR in 1985. Moreover, the MARECS A and MARECS B-2 satellites, which are solely dedicated to INMARSAT service, may be relocated to another ocean region if an emergency situation arises, so that INMARSAT service continues uninterrupted. Thus, Comsat concludes that the present INMARSAT first generation satellite program is sufficiently comprehensive and flexible to provide

[11] A signatory's ownership share of INMARSAT is proportionate to its use of the system. Thus, a 27.2% ownership share means that Comsat uses 27.2% of the INMARSAT service.

[12] The total investment amount for the first generation satellite program does not include the reduction in the lease charges of the MCS satellites or the cost of a fourth MCS satellite to be placed in the POR, since the agreement for these changes as yet has not been approved by INMARSAT. The amount does include the lease cost of the MCS-D satellite, $3.0 million per year for seven years, INMARSAT contends it leased from INTELSAT. *See* footnotes 7 and 10, *supra.*

global maritime communications service, and it is in the public interest for the Commission to authorize Comsat's participation in this program.

III. Discussion

11. INMARSAT was created to establish an international maritime satellite system which would improve maritime communications, distress and safety of life at sea, maritime public correspondence services, radio and navigation capabilities and the efficient management of ships.[13] INMARSAT has been providing these services since February 1, 1982 and has implemented a program which provides service across the globe.

12. The Maritime Satellite Act declares that "the policy of the United States is to support the development and operation of a global satellite maritime telecommunications system by INMARSAT."[14] To further this goal, the Act designates Comsat as the sole operating entity of the United States for participation in INMARSAT, and authorizes Comsat to be the sole owner and operator of the U.S. share of jointly owned international space segment and associated ancillary facilities, established for the purpose of providing maritime satellite services. The Act, however, also requires the Commission to review, evaluate and authorize Comsat's participation in INMARSAT in order to protect the public interest.[15] Comsat therefore must continue to apply to the Commission under Title II and Title III of the Communications Act of 1934, as amended, for authority to provide the space segment channels of communication obtained from INMARSAT, or to construct and operate such satellite terminal stations in the United States.

13. Pursuant to our responsibility, we must determine whether INMARSAT's current plan is sufficiently comprehensive and flexible to enable INMARSAT to meet maritime satellite communications needs, and is in the public interest. To properly evaluate INMARSAT's program, we must consider the current satellite capacity in each ocean region, contingency plans in the event of satellite failure, current and future traffic growth, and current and future revenues and expenses. We must also consider other important elements of the public interest that are not judged solely on economic or service benefits as we assess them. The United States Government's obligations under the INMARSAT agreement, Congressional policy embodied in Section 502 of the Maritime Satellite Act[16] and Section 1 of the Communications Act, as amended,[17]

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[13] Convention, International Maritime Satellite Organization (INMARSAT), September 3, 1976, Art. III, U.S.T. 1, T.I.A.S. No. 9605.

[14] *See* Section 502(a) of the Act, 47 U.S.C. Section 751(a) (1983).

[15] *See* Section 504(3) of the Maritime Satellite Act, 47 U.S.C. Section 753(c)(3) (1983).

[16] 47 U.S.C. Section 751 (1983).

[17] 47 U.S.C. Section 151 (1983).

and general principles of international comity are factors that cannot be quantified, but influence our decision.

14. We have already authorized Comsat to participate in the development of the MCS packages, when it was authorized to participate in the INTELSAT-V satellite series.[18] We found that Comsat's participation in the MCS project was required by the public interest, convenience and necessity, and that the program promises significant benefits for maritime users worldwide. Thus, it would be inconsistent for us not to authorize Comsat's participation in INMARSAT's leasing of the MCS satellites. We find here that Comsat's participation in the entire Baseline + program is in the public interest.

15. The Baseline + plan provides operational flexibility. Presently, INMARSAT has operational and spare satellite capacity in the AOR and IOR, and operational satellite capacity in the POR. The MARECS B-2 satellite, however, is scheduled to begin operating in the POR on January 1, 1985 which will provide the POR with operational satellite capacity. Also, INMARSAT has negotiated with INTELSAT for a fourth MCS satellite to provide spare satellite capacity in the POR. Once these satellites are deployed, INMARSAT will have operational and spare satellites in each ocean region, which are leased to provide service through 1988. The most pressing problem for INMARSAT is the possibility of the failure of MARISAT F-3 in the POR before the MARECS B-2 satellite is ready for service. INMARSAT's contingency plan in this event is to relocate the MARECS A satellite from the AOR to the POR. The relocation of the satellite would take eleven weeks during which time there would be no service in the POR. This situation, however, is a result of the failure of the launch of the MARECS B satellite and the delay in the availability of a fourth MCS satellite in the POR, both of which were beyond INMARSAT's control. To alleviate this problem, INMARSAT presently is investigating ways to shorten the relocation time of the MARECS A satellite. In the AOR and IOR, INMARSAT has adequate spare satellite capacity in the event of satellite failure, especially with the option of leasing the two MARISAT satellites. INMARSAT is also investigating its ability to acquire and launch its own satellite as soon as possible, without waiting for the implementation of the second generation satellite program. Based on these factors, we conclude that INMARSAT has made every effort to preserve the operational integrity of its system, and provide quality maritime communications service.

16. Another important aspect of INMARSAT's program is its ability to meet traffic demands. The 1983 traffic reports from INMARSAT show that traffic and terminal growth is in a declining trend (i.e., it is

[18] Order and Authorization, Communications Satellite Corporation, Mimeo No. 28439 (release date: December 8, 1980).

increasing, but at a decreasing rate). Nevertheless, traffic growth has increased at a much faster rate than originally forecast in Comsat's application. Moreover, INMARSAT has tested the sensitivity of its operational plans to traffic growth to determine the saturation points of the first generation satellite program. INMARSAT developed high, medium and low traffic growth scenarios and concludes that only in the event of high traffic growth does satellite capacity saturation pose a problem. If traffic growth follows the medium or low forecast, the first generation satellite program will have adequate satellite capacity in each ocean region to provide service until the second generation satellite program is implemented in mid-1988.[19] Based on these factors, we conclude that INMARSAT's first generation satellite program is sufficiently comprehensive and flexible to meet projected maritime service demand.

17. Another factor we must consider is the capital investment required to establish the INMARSAT system. In the April 23, 1982 supplement, Comsat stated that its share of the estimated total investment of $227 million, was approximately $61.8 million. Since the INMARSAT system became operational, however, circumstances changed which affected the investment. First, the traffic grew at a rate must faster than originally forecast, which increased revenues. Next, technical difficulties with satellites which cancelled or delayed their use required contracting for different satellites, or delayed investing in the satellites. Also, the cost of the lease for the two MARECS satellites was established at $13.9 million less than the projected $78.4 million, and the lease charges for the MCS satellites were reduced 20% to $4.0 million per satellite per year. Moreover, INMARSAT recorded an actual net profit of $1.3 million for 1983.[20] The estimated capital investment for INMARSAT's first generation program is now $236.6 million, with Comsat's share approximately $54.3 million. We find that this is a reasonable investment in view of the growth of INMARSAT traffic, resulting facility needs and the growing use of the system for U.S. maritime telecommunications traffic. The United States is the largest user of the INMARSAT system. The United States has used more telephone, telex and high speed data service than

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[19] Under the high traffic growth scenario, satellite capacity is saturated only in the AOR before the implementation of the second generation satellite program. Satellite capacity in the POR and IOR will be sufficient to meet traffic demands in the event of high traffic growth. INMARSAT is presently investigating its ability to acquire and launch its own satellite, before the implementation of the second generation satellite program, which would mitigate the possible saturation problem.

[20] The actual profit was a result of four factors: 1) overall underspendings in operating expenses, 2) lower costs due to delays in the availability of the space segment, 3) the relative weakness of the pound sterling in relation to the U.S. dollar, and 4) an increase in revenues resulting from an increase in traffic.

any other user of the INMARSAT system, and provides the most traffic revenue to INMARSAT; $12 million in revenue in 1983.

18. In conclusion, INMARSAT has developed a comprehensive, flexible program to provide international maritime communications service. INMARSAT has considered necessary factors and possible options in developing the program. Although problems beyond its control affect the first generation satellite program, INMARSAT preserves its operational integrity and continues to provide maritime communications service throughout the world. Moreover, the U.S. Government joined INMARSAT with other countries in order to provide a global maritime system, and it is in the interest of international comity to approve Comsat's participation in its program. We therefore conclude that the public interest, convenience and necessity require us to authorize Comsat's participation in INMARSAT's first generation satellite program to ensure its continued existence.

19. Accordingly, IT IS ORDERED that, application File No. CSS-81-001-P, as amended, IS GRANTED, pursuant to Sections 214, 309 and 319 of the Communications Satellite Act of 1984, and IS AUTHORIZED, pursuant to §504(c) of the International Maritime Satellite Telecommunications Act of 1978, to participate in INMARSAT's program to lease circuit capacity in the MARECS A and MARECS B-2 satellites, the MARISAT F-1, F-2 and F-3 satellites and the INTELSAT-V MCS-A, MCS-B, MCS-C, and MCS-E satellites, from 1982 through 1989, to provide global maritime telecommunications service.

20. IT IS FURTHER ORDERED that this authorization is subject to the following condition:

a. Comsat shall not participate in any substantive modifications in the construction program authorized here without prior approval by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix 1

The Original Application

The Baseline Plan called for INMARSAT to lease capacity in six in-orbit satellites. Two satellites would be used in each ocean region, one operational satellite and one backup. In the AOR, INMARSAT would lease the entire capacity of the MARECS-A satellite and the full capacity of the INTELSAT-V MCS-B satellite. In the POR, INMARSAT would lease capacity in MARISAT-A and lease the entire capacity of ESA's MARECS-B satellite. Finally, to provide service to the IOR, INMARSAT would lease the full capacity of two INTELSAT MCS satellites (MCS-A and MCS-C).[1] The cost of leasing the six satellites was estimated to be: (1) MARISAT F-3 - $2.5 million per year for two years; (2) INTELSAT V MCS's - $5 million per satellite per year for seven years; and (3) MARECS-A and MARECS-B - $13.1 million each

[1] INTELSAT V MCS-A (F-5) became available at the beginning 1983 and INTELSAT V MCS-C (F-7) became available for service in February 1984.

year for both satellites for 5 years. Comsat estimated that the space segments described above would cost INMARSAT approximately $177 million. As the U.S. signatory to INMARSAT, Comsat would be required to provide $53 million of that sum. Comsat predicted that under the Baseline Plan, INMARSAT would experience losses of $10.2 million through 1988.

In addition to the Baseline Plan, Comsat also outlined seven options in its original application which could be considered if the Baseline Plan was not to be operational by February 1982. These seven options were:

(1) the lease of (a) a fourth INTELSAT-V MCS to be utilized in the POR at a cost of $3.0 million per year, or (b) a fifth MCS to cost $2.0 million per year;

(2) the lease of a third MARECS satellite (MARECS-C) for an undetermined sum;

(3) the deferment of lease payments and/or the lease period of MARECS-A for three months;

(4) the lease of MARISAT F-2 (IOR) for use on a pre-emptible basis, at a cost of $2 million for one year, $1.4 million for six months and $200,000 for each additional month, or $1.2 million for a four month lease with $200,000 for every month thereafter;

(5) COMSAT General's offer to extend the MARISAT POR satellite's lease for another year for an additional $2.5 million;

(6) the relocation of MARECS B to the IOR for $650,000 and a $72,000 charge for additional TT&C services; and

(7) ESA's offer to extend the lease of its MARECS A and B satellites for two additional years for a total of $6.4 million per year.

Appendix 2

The Transition Plan

On June 17, 1981, Comsat amended its application and informed the Commission that MARECS A had encountered technical difficulties which would delay its availability. As a result, MARECS B's launch was delayed to provide sufficient time to make the necessary corrections to MARECS-B so that it did not develop the same technical difficulties MARECS-A experienced. To provide international maritime service until the MARECS-A and B satellites could be utilized, Comsat sought authority to participate in the following INMARSAT program: (1) lease circuits in the MARISAT F-1 (AOR) satellite for nine months at $3.5 million with an option to extend the lease at $550,000 per month; (2) lease circuits in the MARISAT F-2 (IOR) satellite for one year at $2.0 million dollars; and (3) lease circuits in the MARISAT F-3 (POR) satellite for two years at $5.0 million. This system (the transition plan) was designed to assure the continuation of maritime service while international maritime telecommunication traffic is transferred from MARISAT to INMARSAT. In July, 1981, the INMARSAT Council approved the INMARSAT transition plan.

The Commission, by the Telecommunications Committee authorized Comsat to participate in the INMARSAT transition program on February 8, 1982. The Commission limited its authorization to the transition period and thereby maximized INMARSAT's planning flexibility.

In the additional supplements to its application, Comsat stated that INMARSAT exercised its option to lease a fourth MCS satellite to be used in the POR. Also, Comsat stated that the agreement between INMARSAT and ESA had to be renegotiated because the MARECS B satellite failed at launch. This situation precluded INMARSAT from exercising the second, third, sixth or seventh options of the Baseline plan. Moreover, the failure of the MARECS B satellite required INMARSAT to extend the MARISAT F-3 lease in order to continue to provide service in the POR.

Character Qualifications
Law, Violation of

Review Board assessed substantial and decisive comparative character demerit under a violation of laws issue, reversing the ALJ, and awarded a TV construction permit to the applicant that lacks its opponent's diversification and ownership integration preferences but has no demerits.
—*Focus Television Co.*
BC Docket No. 82-259

FCC 84R-59

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Focus Television Co., A Joint Venture Kannapolis, North Carolina	BC Docket No. 82-259 File No. BPCT-790928KI
Community Action Communications, Inc. Kannapolis, North Carolina	BC Docket No. 82-260 File No. BPCT-800516KO
For Construction Permit for a New Television Station	

Appearances

Benito Gaguine and *Heidi P. Sanchez*, on behalf of Focus Television Co., A Joint Venture; *Robert L. Olender* and *Lee J. Peltzman*, on behalf of Community Action Communications, Inc.; and *Jeffrey W. Malickson*, on behalf of WCCB-TV, Inc.

DECISION

Adopted: August 17, 1984; Released: August 30, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. Occasionally in a comparative broadcast proceeding, an applicant's hard-earned preferences under the diversification and integration criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), are eviscerated by a serious character flaw and the garland of victory falls to a less-endowed but unblemished opponent. *E. g., Bay Television, Inc.*, 95 FCC 2d 181 (Rev. Bd. 1983). This is such a case.

2. By Memorandum Opinion and Order, 47 Fed. Reg. 22216, published May 21, 1982, the mutually exclusive applications of Focus Television Co., A Joint Venture (Focus) and Community Action Communications, Inc. (CAC) for authority to construct a new television station on Channel 64 at Kannapolis, North Carolina were designated for hearing on limited financial issues against both applicants and on the standard comparative issue. Subsequently, then-Acting Chief (now Chief) Administrative Law Judge Thomas B. Fitzpatrick (ALJ) granted summary decision on the financial issues by Memorandum Opinions and Orders, FCC 82M-2199, released July 19, 1982, and FCC 82M-2620, released August 26, 1982. He also added a violation of laws issue against CAC by Memorandum Opinion and Order, FCC 82M-2959, released September 24, 1982, to determine the impact of adverse civil decisions in a United States District Court and a United States Bankruptcy Court on CAC's basic and/or comparative qualifications to be a Commission licensee.[1,2]

3. Chief Judge Fitzpatrick's Initial Decision (I.D.), FCC 84D-9, released February 14, 1984, granted CAC's application. In so doing, he concluded that CAC deserved neither disqualification nor any comparative demerit under the violation of laws issue and that CAC should receive a moderate diversification of media control preference over Focus and a substantial integration of ownership and management preference. Focus was not awarded any preferences or demerits. The proceeding is now before the Review Board on exceptions and briefs filed by Focus and CAC and reply briefs filed by Focus, CAC, and WCCB-TV, Inc., licensee of

[1] *Cooper Tire & Rubber Co.* v. *Tire Savings, Inc.*, No. C-C-77-096 (W.D.N.C. Dec. 7, 1978); *In re Faw*, No. C-B-80-667 (Bank. Ct., W.D.N.C. June 1, 1981).

[2] By Memorandum Opinion and Order, FCC 83M-767, released March 7, 1983, the ALJ also added a settlement candor/misrepresentation issue against Focus. Because the issue was similar to one designated by ALJ Gonzalez in the Hammond, Indiana proceeding (BC Doc. No. 82-195 through 202), the parties agreed to try the issue in the Hammond proceeding and to be bound by Judge Gonzalez's ruling. In a preliminary Initial Decision, FCC 84D-8, released February 13, 1984, Judge Gonzalez exonerated Focus, and no exceptions have been filed to that action in either proceeding.

Station WCCB-TV, Charlotte, North Carolina.[3] The Board has reviewed the I.D. in light of these pleadings, the oral argument held May 3, 1984, and our examination of the record. We hold that CAC should be assessed a decisive comparative character demerit under the violation of laws issue, which overcomes its diversification and (diminished) integration preferences and requires the ultimate conclusion that Focus' application should be granted. In all other respects we adopt the ALJ's findings of fact and conclusions of law, except as modified herein.

4. The violation of laws issue was intentionally framed narrowly by the ALJ to focus only on the impact of the two federal court decisions on CAC's qualifications. Tr. 122. This was done to ensure that due deference would be accorded the substantive legal determinations of the tribunals with primary jurisdiction in the matters, citing *WHW Enterprises, Inc.*, 89 FCC 2d 799, 806, 51 RR 2d 409, 414 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, released September 15, 1983. Tr. 117. At an October 8, 1982 prehearing conference, the ALJ specifically ruled that relitigation of the merits of the decisions would not be permitted, but that CAC could offer evidence in mitigation. Tr. 114-18, 122. We will now only summarize the essentials of the I.D.'s findings (paras. 66-99), which fully set forth the background and details of the two cases.

5. In the *Cooper Tire* case, *supra* note 1, U.S. District Judge James B. McMillan held that D. Garland Faw, CAC's Chairman/Director and proposed full-time general manager, and his wife made a "fraudulent conveyance" of their residence to Truth Temple (CAC's 83.6% owner) on September 28, 1976 "with the intent to place the property beyond the reach of creditors." I.D., Findings, para. 68; Focus Exh. 18 at 4.[4] The Judge's decision set aside the conveyance. As to *In re Faw, supra* note 1, U.S. Bankruptcy Judge Marvin R. Wooten concluded that the Faws conveyed another piece of real property to Joel Fowler, Jr. (associate pastor of Truth Temple, CAC's President/Treasurer/Director and pro-

[3] The hearing designation order herein found that WCCB had standing under *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), but, without explanation, the decretal provision of paragraph 24 thereof appeared to limit participation to the financial issue designated against Focus. At a July 15, 1982 prehearing conference, the ALJ granted WCCB permission to participate in *all* phases of the hearing (TR 68-76) and by Memorandum Opinion and Order, FCC 82M-2633, released August 27, 1982, he denied Focus the right to an interlocutory appeal of that ruling. Focus has now excepted, and we affirm the ALJ's ruling as a proper interpretation of the hearing designation order under Section 1.243 of the Commission's Rules, 47 CFR 1.243, and *Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717, 8 RR 2d 991 (1966).

[4] Mr. Faw is also the pastor of Truth Temple. He was president and 50% owner of Tire Savings, Inc., a tire retailer, from 1972 until November 1977. In September 1975, Faw and his wife agreed to personally guarantee the account of Tire Savings with Cooper Tire, a tire manufacturer. By September 1976 Tire Savings owed Cooper Tire more than $112,000, and its account was delinquent. Focus Exh. 18.

posed full-time sales manager, and Mr. Faw's brother-in-law) on February 2, 1978 "with an actual intent to defraud all of their then existing creditors, and Cooper [Tire] in particular." Focus Exh. 17 at 4. Judge Wooten further found that the Faws' failure to list the conveyed property and an adjoining parcel of land on their 1980 personal bankruptcy petition "was done knowingly and fraudulently" and constituted a "false oath" which was subsequently repeated when Mr. Faw failed to disclose either property to the bankruptcy trustee, in response to his questions, at the first meeting of creditors. *Id.* at 4, 5. Finally, in a subsequent Order, dated December 1, 1981, Judge Wooten held that the Faws "have engaged in a continuous effort to defraud Cooper Tire of its claim, and evade its obligations to that creditor." Focus Exh. 10 at 4. As a result he converted the Faws' personal bankruptcy proceeding from Chapter 13 to Chapter 7, thereby permitting Cooper Tire to share in any distribution. *Id.*

6. Faw's "mitigation" evidence concerning the *Cooper Tire* case consisted of his testimony that he never intended to place his residence beyond Cooper Tire's reach; that the conveyance was intended to aid Truth Temple in acquiring a mortgage for a new auditorium and to confer a personal tax benefit upon him; and that he never even considered what ramifications the conveyance would have with respect to Tire Savings' relationship with Cooper Tire because he did not understand until October 1980 that his personal guarantee of Tire Savings' account meant that Cooper Tire could attach Faw's personal assets if Tire Savings defaulted in its payments. CAC Exh. 6; Tr. 751-57. As to the bankruptcy proceeding, Faw asserted in mitigation that he believed that both parcels of property had been properly transferred to Fowler in 1978 and therefore should not be listed in his bankruptcy petition as his own assets, and that his transfer efforts were not intended to remove the property from creditors, such as Cooper Tire, whom he assumed had no interest in it since no prior effort had been made to seize it. CAC Exh. 6; Tr. 758-59.

7. The ALJ concluded that Faw's mitigation efforts "do not measurably dilute the Court holdings relative to Faw's behavior . . ." I.D., Conclusions, para. 3. He then proceeded to evaluate Faw's past misconduct in light of the two court decisions, the hearing evidence, and applicable Commission precedent, especially *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 592-93, 51 RR 2d 1478, 1485-86 (Rev. Bd. 1982), and *NLT Corp.*, 52 RR 2d 817, 823 (1982).[5] The ALJ emphasized that the Commission's concern is not violations of laws or other misconduct in the abstract, but rather the extent to which the misconduct provides a useful "predictive judgment" about future licensee compliance. I.D., Conclu-

[5] Of course, these cases are, in turn, grounded in the Commission's *Uniform Policy on Violations of Laws*, 42 FCC 2d 399 (1951), and the character fitness concerns of the Communications Act of 1934, as amended.

sions, para. 4. And he acknowledged that the relevant considerations include the nature, frequency, and currency of the misconduct, as well as the relationship of the wrongdoer to the applicant. *Central Texas, supra.* While noting that Faw is an "important principal" of CAC and asserting that the Faws' behavior "cannot be condoned," the ALJ nevertheless concluded that Faw's fraudulent conveyances and false oaths were not broadcast-related, were isolated incidents that did not represent a pattern of behavior, were not recent, and therefore had "little or no predictive value on prospective compliance with the Commission's rules and policies." I.D., Conclusions, para. 5. Accordingly, he neither disqualified CAC nor assessed any comparative demerit against it. He also rejected Focus' contention that Faw had misrepresented or lacked candor in his testimony in this proceeding and bolstered that conclusion with positive credibility and demeanor findings. I.D., Conclusions, para. 7.

8. Focus strenuously excepts to the ALJ's refusal either to disqualify CAC under the violation of laws issue or to assess a decisive comparative demerit against it. It maintains that CAC's so-called mitigation evidence was not credible and was not even "mitigation," but rather a thinly disguised resubmission and relitigation of CAC's unsuccessful past defenses before the federal courts. It further urges that *Central Texas* was misapplied in the instant case and that the Review Board ought to conclude that Faw's conduct *was* broadcast-related, recurring (pattern of behavior), recent, and deliberate, and, thus, fraught with grave predictive value for CAC as a Commission licensee.

9. It is clear from the I.D. that the ALJ was not moved by CAC's mitigation efforts. See paragraph 7, *supra.* This is not surprising because mitigation traditionally emphasizes contrition,[6] subsequent good conduct,[7] and the removal of malefactors from broadcast management positions,[8] but CAC's showing instead focused on explaining and attempting to vindicate Faw's past misconduct. Hence, it strayed perilously close to the walls of relitigation which the ALJ had properly erected. See paragraph 4, *supra.* We do not share Focus' view that the ALJ permitted these walls to be breached, *ipso facto,* because he declined to levy a sanction for Faw's misconduct. We accept at face value the ALJ's deference under *WHW Enterprises, Inc., supra,* to the two federal court decisions and his summary treatment of CAC's attempted mitigation.[9]

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[6] *Donald E. Gilbeau,* 91 FCC 2d 98 (Rev. Bd. 1982).

[7] *Jerry J. Wells,* 87 FCC 2d 935, 50 RR 2d 48 (Rev. Bd. 1981), *modified on other grounds,* 53 RR 2d 250 (1983).

[8] *Gross Telecasting, Inc.,* 92 FCC 2d 204, 52 RR 2d 851 (Rev. Bd. 1982), *rev. denied,* FCC 83-443, released November 21, 1983.

[9] *Cf. Lebanon Valley Radio, Inc.* v. *FCC,* 503 F.2d 196, 199 (D.C. Cir. 1974), in which the Court of Appeals reversed and remanded a Review Board decision in part because of an "unreasonably myopic analysis" of relevant Pennsylvania State court decisions.

The Board likewise defers to the ALJ's credibility and demeanor findings in Faw's favor (see paragraph 7, *supra*), *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63, 66, 36 RR 2d 471, 474 (1976); *Gilmore Broadcasting Corp.*, 95 FCC 2d 289, 293, 54 RR 2d 1265, 1268 (Rev. Bd. 1983), and finds no basis for disqualifying CAC because of alleged lack of candor or misrepresentations in Faw's FCC testimony.[10] In particular, we reject Focus' contention that Faw's mere persistence in arguing lack of fraudulent intent before the ALJ in the face of two adverse court decisions was tantamount to a misrepresentation. Testimony may be rejected without calling into question a witness's veracity or intent. *E.g., Gilmore Broadcasting Corp., supra.*

10. However, our analysis of Faw's misconduct under the *Central Texas* and *NLT* predictive criteria differs markedly from the ALJ's. First, while Faw's fraudulent conveyances and false oaths were not technically broadcast-related, we conclude that these acts are rife with moral turpitude and bode ill for CAC's reliability in its dealings with the public and other governmental agencies such as this Commission. *Compare United Broadcasting Co., Inc.*, 94 FCC 2d 938, 953-55 (Rev. Bd. 1983) (bribery of government official involves moral turpitude and is cognizable in comparative broadcast proceeding), *with Granik* v. *FCC*, 234 F.2d 682, 684 (D.C. Cir. 1956) ("Good faith and fair dealing bear upon the public interest" and should be considered in the Commission's licensing processes), *and Mester v. U.S.*, 70 F. Supp. 118 (E.D.N.Y. 1947) (Commission may properly consider deceptive business practice decisions by other federal agencies and the alleged flagrant disregard for government regulations designed for public protection implicit in those decisions); *see Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983) (applicant disqualified because of a pattern of intentional deception in the FCC application process). The Commission's entire scheme of regulation is premised on our ability to depend on the accuracy and truthfulness of our licensees' and prospective licensees' representations to us, *Country Broadcasting Co., supra*, and we must be alert to the implications of deceptive practices by applicants in other tribunals. In the instant case, Bankruptcy Judge Wooten found that Faw had made two false oaths before his court and held that these actions occurred "knowingly and fraudulently." See paragraph 5, *supra.* We further note that Faw's false

[10] We also note that there were no candor or misrepresentation issues specified in this proceeding. *Compare West Coast Media, Inc.* v. *FCC*, 695 F. 2d 617, 620 (D.C. Cir. 1982) (intent to deceive "should not be discussed by the Commission in the absence of a designated misrepresentation issue") *with RKO General, Inc.*, v. *FCC*, 670 F. 2d 215 (D.C. Cir. 1981) (applicant disqualified because of candorless testimony before the Commission without a designated candor issue).

oaths took place on and after September 24, 1980 (the date he filed his personal bankruptcy petition), which was four months *after* CAC filed its Kannapolis application with the Commission. In other words, at the same time that CAC was attempting to convince this agency of its superior broadcast qualifications, its chairman and proposed general manager was engaged in falsifications in another federal forum. False representations to a federal tribunal are anathematic to FCC licenseeship.

11. Second, unlike the ALJ, we perceive a pattern of behavior, rather than isolated events, and relative recency, rather than remoteness, in Faw's misconduct. It is true that Faw's difficulties all relate to a single ongoing business dispute between his tire company and its supplier, but the misconduct in question spanned four years (1976-1980) and involved four separate delicts (fraudulent conveyances in 1976 and 1978 and two false oaths in 1980). Moreover, both court decisions emphasize the elements of fraud, intent,[11] and falsity. See paragraph 5, *supra.* As summarized by Judge Wooten, the Faws were engaged in a "continuous effort" to defraud Cooper Tire and other creditors. *Id.* That is the unsavory pattern of behavior that we also perceive, and it is a pattern which persisted as recently as four years ago. These facts distinguish the instant case from *Central Texas,* where the delicts in question did not occur over as protracted a period of time and had all taken place at least six years before Commission consideration.

12. Finally, we note the ALJ's recognition that the misconduct at issue here is attributable to "an important principal" of CAC. I.D., Conclusions, para. 4. Nay, more. Faw must be recognized as CAC's *most important* principal—its chairman, proposed general manager, and holder of 27.8% quantitative integration credit. Applicants have been disqualified because of the delicts of less significant principals. *E.g., Country Broadcasting Co., supra* (disqualification because of significant misrepresentations by non-integrated 45% owner who was secretary-treasurer); *WNST Radio,* 70 FCC 2d 1036, 44 RR 2d 492 (Rev. Bd. 1978) (application denied because of misrepresentations by 12.5% stockholder, president, and director of applicant). What makes the slightly lesser sanction of a substantial and decisive comparative demerit against CAC appropriate in the instant case is that the Commission generally reserves its ultimate sanction for

[11] We reject CAC's argument that, under the doctrine of collateral estoppel, the affirmance of the *Cooper Tire* decision by the United States Court of Appeals for the Fourth Circuit (No. 79-1150, January 29, 1980) may only be read as confirming a ruling of technical fraud in the 1976 conveyance, rather than intentional fraud, because it was not necessary for Judge McMillan to find fraudulent intent in order to set aside the conveyance. Our character analysis does not hinge upon whether or to what extent the subject court decisions are technically conclusive in this proceeding but rather on what meaningful character insights the Commission can glean from those decisions. See notes 5 and 9, *supra.*

situations in which grave character misconduct has been displayed by prospective licensees in their dealings with the Commission, rather than elsewhere. *See Country Broadcasting Co., supra.* Even then, a "heightened substantial demerit" may be prescribed instead of disqualification. *See Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 1317 (Rev. Bd. 1983). Here, we conclude that a substantial and decisive comparative demerit adequately reflects the depth of the Commission's concern about Faw's prior misconduct and its predictive value on his future performance as CAC's general manager.[12]

13. Under these circumstances, little need be said about the parties' relative preferences under the *Policy Statement*'s diversification and integration comparative criteria. The ALJ fully catalogued all of Focus' attributable interests in radio and television stations, cable television systems, and other mass media, but, noting that none of these interests were located in Kannapolis, the proposed service area, or even the state of North Carolina, he awarded CAC (which has absolutely no attributable media interests) only a moderate comparative diversification preference over Focus. CAC urges that its preference should have been a substantial one, citing a series of Commission cases from the early 1970's in which a substantial diversification preference was awarded to the applicant that had no media holdings as against others that had one or more other media interests. However, in each of these cases, except *East St. Louis Broadcasting Co.*, 29 FCC 2d 170, 175, 21 RR 2d 992, 999 (1971), the interests of the other applicants were at least partially in-state and the Commission afforded that propinquity decisional significance. Indeed, the Commission's uniform tendency in the last 10 years has been to reserve substantial diversification preferences for situations in which the other applicants have in-town media interests, let alone in-state. *Compare Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev. Bd.), *rev. denied*, FCC 81-473, released October 1, 1981 (substantial diversification preference where one applicant has no media interests and the other already owns a radio station in the proposed community of license), *with Phoenix Media Corp.*, FCC 84R-57, released August 17, 1984 (moderate diversification preference—no media interests versus ownership interests in four in-state broadcast stations). We affirm the ALJ's diversification award.[13]

[12] Although supporting grant of CAC's application, WCCB's reply brief urges that Faw's delicts warrant a minor comparative demerit because of Faw's prominent role in CAC and because more than one violation of law was involved. Reply Br. at 7. Because WCCB filed no exceptions on this point, the matter is considered waived by it, and its belated views will not be weighed. *See* Section 1.277(a), 47 CFR 1.277(a); *High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 634 n. 4 (Rev. Bd. 1983).

[13] Focus asserts that CAC's preference should only have been "slight" because CAC's Faw produces a weekly religious television program that is seen in three cities. However, this production activity does not qualify as a media interest and deserves no diversification

14. As to ownership integration, the ALJ awarded a substantial preference to CAC based on the "clear qualitative difference" between CAC's 55.8% attributable integration credit and Focus' 15.9%. Here, Focus argues that its ownership credit should be increased to 66.7% and CAC's should be diminished, so that Focus would receive at least a slight integration preference over CAC. Along with the ALJ, I.D., Conclusions, para. 12 n. 66, we reject Focus' view that its three-person "management team" should be regarded as controlling the Focus joint venture for integration purposes and that it deserves 66.7% credit for the fact that two of the team's managers will be fully integrated into the proposed station's operation. It is clear that the joint venturers—Kannapolis Television Company (30% owner) and Focus Broadcasting of Kannapolis, Inc. (70%)—actually control the joint venture through their management team appointment/removal powers and the fact that the members of the team are all substantial stockholders in the joint venturers. See I.D., Findings, paras. 8-41. Hence, we affirm the ALJ's derivative ownership attribution approach in arriving at Focus' integration credit. On the other hand, we believe that a moderate integration preference more accurately reflects the extent of CAC's integration advantage over Focus, and we will modify the ALJ's conclusion accordingly. *See Sunbeam Television Corp.*, 38 FCC 805, 5 RR 2d 85 (1965) (moderate preference for 51% integration versus 8.13%); *WHW Enterprises, Inc., supra* (moderate preference for 100% integration versus 66⅔%).

15. In arriving at the ultimate comparative choice between Focus and CAC, we are guided by *Gainesville Media, Inc.*, 72 FCC 2d 795, 45 RR 2d 1621 (1979), and *Peoples Broadcasting Corp., supra*, in both of which cases applicants with integration preferences were assessed substantial character demerits which had the additional effect of diminishing at least the qualitative aspects of their integration advantages.[14] The Commission emphasized in *Gainesville Media, supra*, 72 FCC 2d at 797 n. 6, 45 RR 2d at 1623 n. 6, that such double use of a character demerit was appropriate because the misconduct in question was relevant to two separate issues—the misconduct issue *per se* and the comparative implications of *continuing to integrate* a previous malfeasor into the proposed station's day-to-day operations. In the instant case, CAC's substantial and decisive comparative demerit undermines CAC's moderate integration preference

weight. *See Morris, Pierce & Pierce*, 88 FCC 2d 713, 50 RR 2d 959 (Rev. Bd. 1981), *rev. denied*, FCC 83-31, released January 25, 1983; *Golden State Broadcasting Corp.*, 94 FCC 2d 212, 54 RR 2d 348 (Rev. Bd. 1983).

[14] *But see Radio Station WABZ, Inc.*, 90 FCC 2d 818, 833, 51 RR 2d 1507, 1520 (1982), in which the Commission suggests that there may be circumstances in which an applicant's quantitative integration credit would be diminished, as well, commensurate with the ownership credit otherwise attributable to a principal whose misconduct resulted in a character demerit.

because it relates to CAC's proposed general manager, who also accounts for half of CAC's integration credit. In addition, the independent gravity of the decisive comparative demerit, see paragraph 12, *supra*, must be weighed. When it is, the resulting imbalance offsets CAC's moderate diversification preference (as well as any integration preference that may remain) and tips the scales of comparative justice in favor of Focus, the un-"preferred" but also unblemished alternative. *See Bay Television, Inc., supra.* All exceptions of decisional significance having been taken into account, we conclude that grant of Focus' application will better serve the public interest, convenience and necessity.

16. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Focus Television Company, A Joint Venture, on April 20 and June 4, 1984 ARE GRANTED, and the amendments ARE ACCEPTED;

17. IT IS FURTHER ORDERED, That the motion to correct transcript of oral argument filed by WCCB-TV, Inc. on May 23, 1984 IS GRANTED; and

18. IT IS FURTHER ORDERED, That the application of Focus Television Company, A Joint Venture (File No. BPCT-790928KI) for authority to construct a new television station at Kannapolis, North Carolina, IS GRANTED, and the application of Community Action Communications, Inc. (File No. BPCT-800516KO) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 84D-9

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Focus Television Co., a joint venture Kannapolis, North Carolina	BC Docket No. 82-259 File No. BPCT-790928KI
Community Action Communications, Inc. Kannapolis, North Carolina	BC Docket No. 82-260 File No. BPCT-800516KO
For Construction Permit for a New Television Station	

Appearances

Benito Gaguine and *Heidi P. Sanchez* on behalf of Focus Television Co.; *Robert L. Olender* on behalf of Community Action Communications, Inc.; *Robert Bernstein* and *James L. Blair* on behalf of WCCB-TV, Inc. and *Norman Goldstein* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION
OF
ACTING CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: February 8, 1984; Released: February 14, 1984

Preliminary Statement

1. The Commission, by *Memorandum Opinion and Order* (*Order*), released May 18, 1982[1], set for hearing the above-captioned mutually exclusive applications of Community Action Communications, Inc. (Community) and Focus Television Company, a Joint Venture (Focus) for a new commercial television station to operate on Channel 64, Kannapolis, North Carolina. The *Order* specified the following issues:

1. To determine with respect to Focus:

[1] The *Order* was published in the Federal Register on May 21, 1982, 47 Fed. Reg. 22216.

(a) whether the applicant has $2,765,057 available to construct and operate the proposed station for three months;

(b) whether, in light of the evidence adduced pursuant to (a) above, applicant is financially qualified;

2. To determine with respect to Community:

(a) whether the applicant has $320,973 available to construct and operate the proposed station for three months;

(b) whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified;

3. To determine, on a comparative basis, which of the applicants would better serve the public interest;

4. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applications should be granted.

The Commission further ordered that WCCB-TV, Inc.[2] (WCCB), licensee of Station WCCB-TV, Charlotte, North Carolina, be made a party with respect to issue 1, the Focus financial issue.[3]

2. By *Memorandum Opinion and Order* (FCC 82M-2199), released July 19, 1982, the Presiding Judge granted a Motion for Summary Decision filed by Focus and resolved issue 1 relating to the financial qualifications of Focus, in favor of Focus. By *Memorandum Opinion and Order* (FCC 82M-2620), released August 26, 1982, the Presiding Judge granted a Motion for Summary Decision filed by Community and resolved issue 2, relating to the financial qualifications of Community, in favor of Community.

3. Subsequently, by *Memorandum Opinion and Order* (FCC 82M-2959), released September 24, 1982, the Presiding Judge added the following issue with respect to Community:[4]

> To determine the impact of the rulings in *Cooper Tire and Rubber Co., v. Tire Savings, Inc., et al.*, and *In re: D. Garland Faw and wife, Kay W. Faw*, upon the basic and/or comparative qualifications of Community Action Communications, Inc., to be a Commission licensee.

4. Prehearing conferences were held on June 9, July 15, and October 8, 1982. Hearing sessions were held on November 16, 17, 18 and 19, 1982, and January 21, 1983, at the Commission's offices in Washington, D. C.

5. By *Memorandum Opinion and Order* (FCC 83M-767), released March 7, 1983, the Presiding Judge added the following issues with respect to Focus:

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[2] Now Bahakel Communications, Ltd. (Bahakel).

[3] At a July 15, 1982 prehearing conference, the Presiding Judge ruled that WCCB would be entitled to participate fully in the instant proceeding. (TR 75-76) By *Memorandum Opinion and Order* (FCC 82M-2633), released August 27, 1982, the Presiding Judge denied Focus' "Motion for Leave to Appeal Interlocutory Ruling."

[4] The Presiding Judge ruled that the burden of proceeding with the introduction of evidence rested with Focus and the burden of proof rested with Community.

To determine all of the facts and circumstances surrounding the execution of the various settlement agreements between Focus Broadcasting Co. and Latin American Communications, Inc. relative to Channel 66, Joliet, Illinois, and whether the principals of Focus of Kannapolis, Inc. were lacking in candor or misrepresented to the Commission their intentions in tendering the "Joint Request for Approval of Agreement" on February 1, 1980 and the January 25, 1980 Agreement; and,

To determine whether the principals of Focus of Kannapolis, Inc. intended at the time to circumvent the then existing restrictions against excessive reimbursement in connection with the dismissal of the application of Latin American Communications, Inc. and the effect of these determinations on the basic and/or comparative qualifications of Focus Television Co., a Joint Venture, to be a licensee.

6. The Presiding Judge noted the similarity between the issues framed, *supra*, and the issues specified by Judge Gonzalez in the *Apogee* case, involving the mutually exclusive applications for a new television station in Hammond, Indiana. For this reason, the Presiding Judge urged the parties in both proceedings to meet for the purpose of reaching an agreement as to which docketed proceeding should be the sole forum for resolving the issues and expressed a willingness to be bound by the rulings of the Presiding Judge in the Hammond, Indiana proceeding. The parties in the Kannapolis and Hammond proceedings notified the respective Presiding Judges that they had agreed to try the issues added by him in the Hammond, Indiana proceeding.[5]

7. Proposed Findings of Fact and Conclusions of Law and Reply Findings were filed by the applicants and Bahakel with respect to the issues litigated in this proceeding on March 14, and April 4, 1983, respectively.

Findings of Fact

I. The Comparative Issue

A. Focus Television Company (Focus)

(a) Structure

8. On September 28, 1979, Cabarrus Television Corporation (Cabarrus) filed an application for a new UFH television station on Channel 64 at Kannapolis, North Carolina (File No. BPCT-790928KI). Cabarrus is a wholly-owned subsidiary of Home News Publishing Company. (Focus Ex. 11, p. 2; WCCB Ex. 3, p. 1; TR 402)

9. On May 16, 1980, the "A" cut-off date in this proceeding, the Cabarrus application was amended to substitute Kannapolis Television

[5] By *Order* (FCC 84M-0069), released January 10, 1984, the Presiding Judge ruled that, in the event the application of Focus is granted, such grant will be made subject to the following condition: This grant is conditioned upon and is without prejudice to whatever action, if any, the Commission may deem appropriate as a result of any final Commission action or decision considering the matter of whether Focus Communications, Inc., is or was a real-party-in-interest in Patricia B. Steele's Alvin, Texas television application (MM Docket No. 84-440-444, BPCT-8201008KQ).

Company, a Joint Venture (KTC) as the applicant. The Cabarrus' application, as amended, reflected the new applicant, KTC, and its ownership of 55% by Kannapolis Broadcasting Company (KBC) and 45% by Cabarrus.[6] (Focus Ex. 11, p. 2; Focus Ex. 13, pp. 1-2)

10. Focus Broadcasting of Kannapolis, Inc. (Focus/Kannapolis) also filed a competing application on May 16, 1980 (File No. BPCT-800516KE). (WCCB Ex. 2, p. 1)

11. On September 8, 1980, the "B" cut-off date in this proceeding,[7] Focus/Kannapolis and KTC jointly amended their applications and substituted a new applicant, Focus Television Company, a Joint Venture (Focus), which they had formed by merger. Focus/Kannapolis held a seventy percent interest in the new joint venture. The remaining thirty percent interest was held by KTC. (WCCB Ex. 1, p. 5; Focus Ex. 11, p. 2; Focus Ex. 12, pp. 1-35; TR 453-455)

12. On May 3, 1982, Focus amended its application to switch the interests of the parties in the latest joint venture applicant. Focus/Kannapolis changed its interest from seventy to thirty percent. KTC, in turn, switched its interest from thirty to seventy percent.[8] The change in ownership interests was made at the initiative of Focus/Kannapolis and was agreed to only days before the amendment was filed. (Focus Ex. 11, p. 3; Focus 14, pp. 1-5; TR 450, 465) Under the terms of the joint venture agreement, each 33 1/3 percent (or majority portion thereof) component of the joint venture could name one member to a three-person management committee. As discussed, *infra*, as a result of the switch in ownership interest, Focus/Kannapolis at present has one representative on the management committee, Ronald Honesty, and KTC has two, Hugh Boyd and James Wilks. Boyd and Wilks were selected by the management team

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[6] As detailed, *infra*, KBC is comprised of four individuals, Hugh M. Boyd, John Boyd, Kathryn Boyd Rapp, and James G. Wilks, almost all of whom have present or former connections to the other joint venturer, Cabarrus and/or its parent, Home News Publishing Company. Hugh Boyd, John Boyd, and Kathryn Boyd Rapp are all directors and officers and/or stockholders of Home News Publishing Company. (Focus Ex. 4, p. 1; Focus Ex. 13, p. 2; TR 440)

[7] See 45 Fed. Reg. 49980, published July 28, 1980.

[8] Community, in a May 25, 1982 Application for Review of the *Order* designating the applications for hearing, challenged this May 3, 1982 amendment, arguing that the amendment constituted a transfer of control and required the assignment of a new file number to Focus' application and the resulting removal of that application from hearing, pursuant to Section 73.3572(b) of the Rules, 47 CFR 73.3572(b). The Commission, by *Order* (FCC 82-478), released November 3, 1982, denied Community's Application for Review on the grounds that Focus' May 3, 1982 amendment did not constitute a major change requiring the filing of a long form assignment application, the assignment of a new file number, and removal from hearing. The Commission was silent as to the impact on the comparative posture of this case.

of KTC while Honesty was selected by Focus/Kannapolis.[9]

13. It is ruled that, for purposes of comparative evaluation, the ownership of Focus as of September 8, 1980, the B cut-off date, is controlling. It is axiomatic that an applicant should not be permitted to obtain a comparative advantage by a late filed amendment of its application. The B cut-off date is the time frame when these proposals were frozen, comparatively speaking, and, as a consequence, Focus will be considered to be owned 70% by Focus/Kannapolis and 30% by KTC. However, so that reviewing authority may have all the facts before it for its consideration, findings will also be made as to what the derivative ownership of the integrated principals of Focus would be if the ownership was reversed.

Home News Publishing Company (Home News)

14. As noted, *supra*, Home News owns 100% of Cabarrus, which in turn owns 45% of KTC, the 30% owner of Focus. The officers, directors and stockholders of Home News who are proposed to be integrated into the operation of the station are as follows (Reformed Focus Ex. 1):[10]

Hugh M. Boyd, Assistant Vice-President, 6.63%[11]

John D. Boyd, Assistant Vice-President, 6.42%[12]

Kathryn Boyd Rapp, 6.68%

Kannapolis Broadcasting Company (KBC)

15. As noted, *supra*, KBC owns 55% of KTC, the 30% owner of Focus. The officers, directors and stockholders of KBC who are proposed to be integrated into the operation of the station are as follows (Reformed Focus Ex. 1):

Hugh M. Boyd, President, Director and 30% shareholder

James G. Wilks, Vice President, Director and 10% shareholder

John D. Boyd, Treasurer, Director and 30% shareholder

Kathryn Boyd Rapp, Secretary, Director and 30% shareholder

Focus/Kannapolis

16. As noted, *supra*, Focus/Kannapolis has been ruled to own 70% of Focus.[13] The officers, directors and shareholders of Focus/Kannapolis are

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[9] The membership of the Focus management committee as of the "B" cut-off date, and until May 3, 1982, included Hugh M. Boyd from KTC and Joon Chung, and Ronald Honesty from Focus/Kannapolis. Its membership was changed as a result of the joint venture agreement in May 1982. (Focus Ex. 11, p. 2; TR 496-497) The management committee may be expanded in the future. (Focus Ex. 11, p.3; TR 312, 496, 583-584)

[10] None of these individuals is either an officer or director of Cabarrus.

[11] Hugh M. Boyd also holds .75% as custodian for Jessica and William C. Boyd.

[12] John D. Boyd also holds .75% as custodian for Danielle and David John Boyd.

[13] This 70% represents Focus/Kannapolis interest in Focus as of September 8, 1980, the B cut-off date.

as follows (Reformed Focus Ex. 1):

Name	*Office*	*Director*	*Ownership Interest in Focus/Kannapolis as of "B" Cut-of November 21, 1982*	*Interest in Focus/Kannapolis as of "B" Cut-off September 8, 1980*[14]
Joan Chung[15]	President	Yes	6.14%	6.14%
Irene M. Chung[15]	—	—	6.14%	6.14%
Douglas F. Ruhe	Assistant Secretary	Yes	6.14%	6.14%
Beverly Ruhe	—	—	6.14%	6.14%
William Geissler	Secretary	Yes	6.14%	6.14%
Judith D. Geissler	—	—	6.14%	6.14%
Betty J. Livingstone	—	—	2.0%	2.5%
William H. Smith	—	—	0.0%	5.0%
John A. Robinson	—	—	9.5%	8.5%
Michael Marsh	—	Yes	9.5%	8.5%
Marcene P. Juergensen	—	—	9.5%	8.5%
Ronald Honesty	—	—	12.5%	8.5%
Sarah S. Williamson[16]	—	—	1.0%	5.0%
Anelson Watkins	Treasurer	Yes	9.5%	8.5%
Dwight W. and Carole J. Allen, Jointly	—	—	1.9%	1.9%
Ronald L. and Kongja R. Goble, Jointly	—	—	0.3%	0.3%
Alan and Carolyn Keller	—	—	0.43%	0.43%
Allen Investment Co.	—	—	0.65%	0.65%
Focus Communications, Inc.	—	—	.28%	0.0%
Darrell W. Anderson	—	—	1.84%	2.09%
Gloria W. Anderson	—	—	1.84%	2.09%
Juan Caban	—	—	0.35%	0.36%
Neil McHugh	—	—	0.10%	0.0%
Fred H. Stewart	—	—	0.35%	0.36%

[14] The ownership interests of some of the Focus/Kannapolis principals were changed subsequent to the September 8, 1980 "B" cut-off date in this proceeding. For instance, Focus amended its application on November 14, 1980 to increase Ronald Honesty's ownership interest in Focus/Kannapolis from 8.5% to 12.5%. Therefore, the percentage ownership of Focus/Kannapolis has been set forth as of September 8, 1980, the B cut-off date, and as of November 21, 1982, the date the direct written case was exchanged. For the reasons set forth, *supra*, the September 8, 1980 date will be controlling for purposes of comparative evaluation.

[15] In December 1982, Joon and Irene M. Chung divested their interests in Focus/Kannapolis. As reported in an amendment dated January 28, 1983 and accepted by *Order* (FCC 83M-780), released March 8, 1983, Ronald Honesty was elected President, and the shareholdings of the Chungs were purchased by Focus Communications, Inc. Focus Communications, Inc. is owned by: Douglas F. Ruhe, Beverly Ruhe, William Geissler, Judith Geissler (each 24.5 percent); Juan Caban and Fred Stewart (each 1.0 percent).

[16] As reported in an amendment filed March 8, 1983, Sarah Susan Williamson divested all of her interests in Focus. Her 1% interest was acquired by Ronald Honesty, and her office was assumed by William Geissler.

(b) Integration

17. In its application, as filed on May 16, 1980, Focus/Kannapolis specified that the following principals would have full-time management positions at the proposed station (WCCB Ex. 2, p. 4):

Anelson Watkins	–	Station Manager
Ronald Honesty	–	Program Director
S. Susan Williamson	–	Sales Director
Michael Marsh	–	News Director
John Alfred Robinson	–	Community Service Director
Marcene P. Juergenson	–	Production Assistant

Focus never filed any amendment deleting reference to these individuals as the proposed management personnel at the Kannapolis station. (TR 547)[17]

18. In the September 8, 1980 amendments to the FTC and Focus/Kannapolis applications, filed on the "B" cut-off date, Focus specifically incorporated by reference, without any changes or deletions, the management proposal of Focus/Kannapolis. (WCCB Ex. 1, pp. 2, 4) Focus, in its September 8, 1980 filing, added the following additional full-time management positions to its proposal: Hugh M. Boyd, Assistant Station Manager and James G. Wilks, Assistant Sales Director. (WCCB Ex. 1, p. 5) No subsequent amendment proposed any change in Focus' integration proposal. (TR 353-354)

19. However, when Focus exchanged its hearing exhibits on November 21, 1982, it changed its integration proposal, dropping all reference to Watkins, Williamson, Marsh, Robinson and Juergenson. Focus also upgraded the proposed managerial positions of Hugh M. Boyd and Wilks. These changes in Focus' integration proposal occurred as a direct consequence of the "70-30" "flip-flop" of Focus/Kannapolis' and KTC's interests in Focus in May, 1982. When the "flip-flop" was being finalized, all the Focus principals who were then proposed to be integrated into the day-to-day operation of the station were offered the opportunity to withdraw or continue such participation. Watkins, Williamson, Marsh, Robinson, and Juergenson decided that they did not wish to continue their participation. Honesty determined that he would continue in his proposed position as Program Director. At the same time, Hugh M. Boyd and James G. Wilks agreed to be Station Manager and Sales Manager, respectively, and John D. Boyd agreed to be Production Manager and Kathryn Boyd Rapp agreed to be Director of Public Affairs. (TR 503-506, 562) As a result, in its November 21, 1982 exhibit exchange, Focus proposed the

[17] Cabarrus did not include a management proposal in its application, filed September 28, 1979. Nor did KTC in the amendment to the Cabarrus application, filed May 16, 1980.

integration of the following principals into full-time managerial positions:[18]

Hugh M. Boyd	–	Station Manager[19]
John D. Boyd	–	Production Manager
Kathryn Boyd Rapp	–	Director of Public Affairs
James G. Wilks	–	Sales Director
Ronald Honesty	–	Program Director

20. *Hugh M. Boyd* presently resides in Denver, Colorado. He will move to Kannapolis and devote full-time to his duties at the station. (TR 292-93, 296)[20]

21. Hugh M. Boyd has a bachelor's degree in mass communications. His broadcast experience includes two years in a management position at Station WEVU-TV, Naples, Florida, and two summers in non-management positions at Station WINE-AM-FM, Brookfield, Connecticut, and Station WKPT-AM-FM-TV, Kingsport, Tennessee.[21] He also has extensive experience working for various weekly and daily newspapers. (Focus Ex. 5, pp. 1-2)

22. As of September 8, 1980, H. M. Boyd was serving in the capacity of an Assistant to the General Manager of Station WEVU-TV, Naples, Florida. It was H. M. Boyd's understanding, at that time, that he would fulfill the same function as the proposed Assistant Manager at the Kannapolis station as he was doing at Station WEVU-TV.[22] H. M. Boyd changed his integration commitment to Station Manager subsequent to the "B" cut-off date. (WCCB Ex. 1, p. 5; WCCB Ex. 2, p. 4; TR 317-318, 337-338, 468)

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[18] The question whether the May 1982 change in Focus' integration proposal constitutes an impermissible variance will be considered and ruled upon, *infra*, in the conclusions.

[19] As Station Manager he would be responsible for coordinating the technical operations of the station, scheduling and regulating the work schedules of station personnel, and scheduling all use of the station's technical facilities. (Focus Ex. 3, p. 1)

[20] He has discussed with his wife the possibility of moving to the Kannapolis area. He believes she will agree to such a move. (TR 296, 444-445)

[21] He was a news photographer, radio disc jockey and advertising account assistant for Station WKPT-AM-FM-TV in 1972 and a news reporter for Station WINE-AM-FM in 1973. He was assistant general manager of Station WEVU-TV from 1980 until 1982. In this position he handled personnel management, preparation and review of annual budgets, relations with the network and program promotions. (Focus Ex. 5, pp. 1-2)

[22] H. M. Boyd specifically stated that his function would be that of an assistant:

"Judge Fitzpatrick: Well, don't you recognize that an Assistant Manager has to be an assistant to somebody and, therefore, there's somebody above him? How can you be an assistant if there isn't somebody to whom you're assisting, so the question is, if you're an Assistant Manager, then there has to be a Manager. Do you disagree with that?"

"The Witness: _ No." _ (TR 330)

23. As detailed, *supra*, Hugh M. Boyd's ownership interest in Home News Publishing Company is 6.63% and his interest in KBC is 30%, resulting in his current derivative interest in Focus totalling 13.64 percent.[23] At the time of the "B" cut-off date, Hugh M. Boyd's derivative interest in Focus was 5.8 percent. (Focus Reformed Ex. 1, pp. 7, 8)[24]

24. As noted, *supra*, *John D. Boyd* is proposed for full-time integration as Focus' production manager. He will be responsible for the production of the station's local programming and will supervise directly all of the technical personnel at the station. (Focus Ex. 3, p. 1; Focus Ex. 6, p. 2; TR 604, 607) At the time of the "B" cut-off, September 8, 1980, Focus did not list John D. Boyd in a management position and did not propose any principal for the position of Production Manager. (WCCB Ex. 1, p. 5; WCCB Ex. 2, p. 4) John D. Boyd could not remember when it was decided that he would serve as Production Manager. (TR 606)

25. John D. Boyd's communications experience includes serving as a production assistant at Station KGSC(TV), San Jose, California for approximately one year from 1975 to 1976, where he was responsible for operation of sound and camera equipment, lighting and set construction. It also includes employment at Perkiomen Home/Vue Inc., a cable franchise in Collegeville and Trapp, Pennsylvania since January 1980, where his duties have included direct supervision of all production,

[23] To determine the derivative interest of any individual in Focus, as of November, 1982, the exhibit exchange date, that individual's interest in his component entity has been multiplied by an appropriate factor. As noted, *supra*, Home News owns 100 percent of Cabarrus, which holds a 45 percent interest in KTC, which, in turn, currently holds a seventy percent interest in Focus. Thus, to determine the derivative interest in Focus of any of the Home News stockholders, as of November 1982, that individual's interest in Home News has been multiplied by a factor of .315 (100% × 45% × 70%). Similarly, KBC holds a 55 percent interest in KTC. Thus, to determine the derivative interest in Focus of each KBC stockholder, as of November, 1982, that individual's interest in KBC has been multiplied by a factor of .385 (55% × 70%). Lastly, Focus/Kannapolis currently holds a thirty percent interest in Focus. Thus, to determine the derivative interest in Focus of each Focus/Kannapolis stockholder, as of November, 1982, that individual's interest in Focus/Kannapolis has been multiplied by a factor of .30 (30%).

[24] To determine the derivative interest of any individual in Focus as of the "B" cut-off date in this proceeding, that individual's interest in his component entity must be multiplied by a different factor than that used above to determine the current derivative interest of each individual. As noted, *supra*, KTC held a thirty percent interest in Focus as of September 8, 1980. Therefore, to determine the derivative interest in Focus of each Home News stockholder as of the "B" cut-off date, that individual's interest in Home News has been multiplied by a factor of .135 (100% × 45% × 30%). Similarly, to determine the derivative interest in Focus of each KBC stockholder as of the "B" cut-off date, that individual's interest in KBC must be multiplied by a factor of .165 (55% × 30%). Finally, since Focus/Kannapolis held a seventy percent interest in Focus as of September 8, 1980, to determine the derivative interest in Focus of each Focus/Kannapolis stockholder as of the "B" cut-off date, that individual's interest in Focus/Kannapolis must be multiplied by a factor of .70 (70%).

technical, marketing, office and construction personnel. He has served as Vice President for Operations at the cable company since Fall, 1982. (Focus Ex. 6, p. 1; TR 332, 595, 598, 601, 604, 612-613)

26. In addition to this direct experience, John Boyd, and also Hugh Boyd, have had experience in the formulation of policies by media entities through their offices and directorships on various boards of directors. Hugh Boyd is currently Assistant Vice President and Director of Home News, publisher of a daily newspaper in New Brunswick, New Jersey. John Boyd is a director of Home News, Holston Valley Broadcasting Corporation, Caloosa Television Corporation, Housatonic Valley Broadcasting Corporation, Northwest Connecticut Broadcasting Corporation, and Perkiomen Home/Vue Inc. (Focus Ex. 6, p. 5; Focus Ex. 7, pp. 1-2; TR 596-98)[25]

27. John D. Boyd acknowledged that he presently spends one day per month working in his capacity as an officer and director of Home News at that company's offices in New Brunswick, New Jersey. He spends one day every three months at Kinsport, Tennessee working as a director of Holston Valley Broadcasting Corp and one day every three months working as a director of Caloosa Television Corp. He also spends one day every three months working as a director of Housatonic Valley Publishing Company in New Medford, Connecticut and one day every three months working as a director of Northwest Connecticut Broadcasting Corp. John D. Boyd also is a director of Housatonic Valley Broadcasting Corp., Brookfield, Connecticut. He travels to the headquarters of each of these companies to attend meetings. He stated that he would attempt to attend board meetings held by Perkiomen Home/Vue Inc., his present employer, even should he be working at the Kannapolis station. He also plans to attend the board meetings of those companies of which he is a director, should Focus be granted the Kannapolis station, since he saw no reason why he could not continue as a director of these companies. He explained that the time spent attending these meetings varied and that they are combined when possible. He made clear that he would continue those directorships only if it proved to be possible. (Focus Ex. 4, pp. 1, 3, 4, 5, 6, 7; TR 596-598, 600-601)

28. John D. Boyd currently resides in Yardley, Pennsylvania. (Focus Ex. 6, p. 1; TR 598) He would move to the Kannapolis area if the Focus application is granted. (TR 598)

29. As a result of his 6.42% ownership interest in Home News and his 30% ownership interest in KBC, John D. Boyd's current derivative interest in Focus amounts to 13.57 percent. At the time of the "B" cut-off date, his derivative interest in Focus was 5.8 percent. (Focus Reformed Ex. 1, pp. 7, 8; Focus Ex. 6, p. 2)

[25] The broadcast stations licensed to these entities are detailed, *infra*, re diversification.

30. *Kathryn Boyd Rapp*, at the time of exhibit exchange, November, 1982, was proposed for full-time integration as Focus' Director of Public Affairs, responsible for the station's relations with the community and for ensuring that the station is responsive to the Community's needs and interests.[26] Mrs. Rapp did not testify at the hearing. She was pregnant and expecting a baby in February 1983. A stipulation was entered into by the applicants that, if Mrs. Rapp were present, she would testify that it is her intention to devote whatever time and effort is required of her to her family, and to give those duties the first and highest priority. In the event that those duties interfere with her proposed activities at the station, her family duties will take precedence. While it is her intention, eventually, to work at the station and to satisfy her management proposal, she could not predict a date for such employment or, in fact, guarantee that such employment would ever occur. (Focus Ex. 7, p. 1; Stipulation, p. 1)

31. Mrs. Rapp currently resides in Carmel Valley, California.[27] She is a professional pilot and has no prior broadcast experience. Mrs. Rapp did not represent that she would relocate to either the community of Kannapolis nor the Kannapolis area were the Commission to grant Focus' application. (Focus Ex. 7, p. 1)

32. As a result of her 6.68% ownership interest in Home News and her 30% ownership interest in KBC, Mrs. Rapp's current derivative interest in Focus amounts to 13.65 percent. At the time of the "B" cut-off date, her derivative interest in Focus was 5.85 percent. (Focus Reformed Ex. 1, pp. 7, 8; Focus Ex. 7, p. 1)

33. *James D. Wilks*, at the time of exhibit exchange, November, 1982, was first proposed for full-time integration as Focus' Sales Director. He will have overall responsibility for management of the station's sales department.[28] (Focus Ex. 3, p. 1; Focus Ex. 8, pp. 1-2) As noted, *supra*, at the time of the "B" cut-off, September 8, 1980, Wilks was designated by Focus for full-time integration in the position of Assistant Sales Director, while S. Susan Williamson was designated as Sales Director for the Kannapolis applicant. (WCCB Ex. 1, p. 5; WCCB Ex. 2, p. 4; TR 546, 547)

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[26] At the time of the "B" cut-off, September 8, 1980, Focus did not list her in its management proposal. It did, however, propose John Alfred Robinson as Community Service Director at the station. Focus, at hearing, did not list the position of Community Service Director as a management-level position. Community's contention that a review of Mrs. Rapp's job description as Director of Public Affairs shows that the position of Community Service Director and Director of Public Affairs are one and the same is rejected as is its argument that her proposed integration is at variance with Focus' application as it existed on the "B" cut-off date in this proceeding.

[27] Mrs. Rapp is the sister of Hugh M. Boyd and John D. Boyd.

[28] Wilks played no part in formulating Focus' revenue projections and first saw them when he came to Washington, D. C. for the hearing. (TR 586) He is a good friend of Hugh M. Boyd. He had never spoken to Honesty until a few days prior to the hearing. (TR 580-581)

34. Wilks currently resides in San Antonio, Texas. He plans to move to Kannapolis in the event that Focus is awarded a construction permit. (Focus Ex. 8, p. 1; TR 576) Wilks spent most of his life in the Charlotte area and considers it his home. (TR 438, 576)

35. Wilks is currently employed as a commercial property underwriter for the Hartford Insurance Company in San Antonio. His has no broadcast experience; however, he has had extensive experience in sales. (Focus Ex. 8, pp. 1-2; TR 574, 575) He is a Black American. (Focus Ex. 2, p. 1)

36. As a result of his 10% ownership interest in KBC, he currently has a 3.85 percent interest in Focus. (Focus Reformed Ex. 1, p. 7; Focus Ex. 8, p. 1) At the time of the "B" cut-off date in this proceeding, Wilks' derivative interest in Focus was 1.65 percent. (Focus Ex. 1, p. 8)

37. *Ronald Arthur Honesty* is proposed for full-time integration as Focus' Program Director. He will be responsible for securing STV programming, other non-local programming, and local programming. He will have primary responsibility for ensuring that the station's programming is consistent with all commitments made to the Commission and with the policies established by the Joint Venture. (Focus Ex. 3, p. 1; Focus Ex. 9, p. 3)

38. Honesty currently resides in Belmont, Massachusetts. He is married to S. Susan Williamson, but was in the process of obtaining a divorce. (Focus Ex. 9, p. 1; TR 478, 507) He intends to move to the community of Kannapolis in the event that Focus is awarded a construction permit. (TR 481, 522-524)[29]

39. Honesty currently is employed as a sales representative for Cambridge Tire Company, Cambridge, Massachusetts. He claims no broadcast experience. (Focus Ex. 9, p. 1) Honesty is a Black American who has spent the greater portion of his adult life in the fields of education and social services. (Focus Ex. 2, p. 2; TR 481)

40. Presently, Honesty has a 13.5% ownership interest in Focus/Kannapolis, resulting in a current 4.05 percent interest in Focus. (Focus Reformed Ex. 1, p. 7) However, as of the "B" cut-off date, September 8, 1980, Honesty owned an 8.5% interest in Focus/Kannapolis.[30] Consequently, Honesty's derivative interest in Focus as of September 8, 1982, was 2.55% (8.5% × 30%).

41. The Joint Venture Agreement provides that the joint business venture is to be managed by a Management Committee composed of 3 members, which shall "exercise all of the powers of the joint venture."

[29] As of the date of his testimony, November 17, 1982, Mr. Honesty had never visited Kannapolis. (TR 512)

[30] Honesty's ownership interest in Focus/Kannapolis was not increased to its present amount until after the "B" cut-off date, on November 14, 1980 and on March 8, 1983.

(Focus Ex. 12, p. 7) As discussed, *supra*, the Joint Venture Agreement provides that each 33⅓% (or majority portion thereof) component of the joint venture is entitled to name 1 member to the 3 person management committee. (Focus Ex. 12, p. 11) As of September 8, 1980, the "B" cut-off date, the committee membership was: Hugh M. Boyd, representing KTC's 30% interest, and Joon Chung and Honesty representing the 70% interest of Focus/Kannapolis. As a result of the "flip-flop" in ownership of the joint venture in May 1982, KTC, now has Hugh M. Boyd and James Wilks, representing its 70% interest and Focus/Kannapolis has Honesty, representing its 30% interest. (Focus Ex. 11, p. 2; TR 496-97)

(c) Diversification of Media

42. Focus Television Company, a Joint Venture, has no media interests. Cabarrus Television Corporation (Cabarrus); Kannapolis Broadcasting Company (KBC); Kannapolis Television Company (KTC), a Joint Venture; and Focus of Kannapolis, Inc. (Focus/Kannapolis), have no media interests. However, Home News Publishing Company (Home News), the 100% owner of Cabarrus,[31] has the following interests: it publishes a daily newspaper in New Brunswick, New Jersey; it is the 100% owner of Holston Valley Broadcasting Corporation, licensee of Stations WKPT-AM, WTFM(FM) and WKPT-TV, Kingsport, Tennessee, and five television translators in Tennessee and Virginia and an FM translator in Tennessee; it is the 100% owner of Coloosa Television Corporation, licensee of Station WEVU-TV, Naples, Florida; it is the 100% owner of Housatonic Valley Publishing Company, publisher of several weekly newspapers in Connecticut and New York; it is the 98.1% owner of Housatonic Valley Broadcasting Corporation, licensee of Stations WINE(AM) and WRKI(FM), Brookfield, Connecticut; it is the 100% owner of Northwest Connecticut Broadcasting Corporation, licensee of Station WSNG(AM), Torrington, Connecticut; and it is the 71% owner of Perkiomen Home/Vue Inc., franchisee of cable systems in Collegeville and Trapp, Montgomery County, Pennsylvania, and Graterford Prison, Pennsylvania. Central Valley Communications, Inc., a wholly owned subsidiary of Home News, is the licensee of Stations KWG(AM), Stockton and KWGF(FM), Tracy, California. (Focus Ex. 4, pp. 1-8; TR 191-94)

43. Members of the Boyd family have a controlling interest in Home News. Hugh M. and John D. Boyd and other members of the Boyd family are officers and directors of Home News. (Focus Reformed Ex. 1)

44. Principals of Focus/Kannapolis[32], control 86 percent of Focus Broadcasting Company, licensee of Station WFBN(TV), Joliet, Illinois,

[31] Cabarrus is the owner of 45% of KTC which, as of September 8, 1980, owned 30% of the applicant, Focus.

[32] Focus/Kannapolis, as of September 8, 1980, owned 70% of the applicant, Focus.

holds a controlling interest in the permittee of UHF Channel 39, Murfreesboro, Tennessee; 25% of Focus-Tidewater, Inc., permittee of Channel 49, Norfolk, Virginia; 70% of The Greater Harrisburg Channel 59, Inc., permittee of Channel 59, Lebanon, Pennsylvania; and 70% of Syracuse Channel 62, Inc., permittee of Channel 62, Syracuse, New York.[33] Also, one Focus principal is a member of the Advisory Council for Massachusetts Educational Television, and others have majority control of Media News Corporation, owner of United Press International, a news gathering organization. (Focus Ex. 4; pp. 8-12; Focus Ex. 4A; Focus Ex. 15, p. 1)

45. The specific ownership interests and the positions held by principals of Focus/Kannapolis in media entities are as follows:

Name	*Interest*
Douglas F. Ruhe	President, Director, 8.89% Shareholder, Focus Broadcasting Company, licensee of Station WFBN(TV), Joliet, Illinois (Focus Joliet)
	Vice President, Director, 14.29% shareholder, Channel 39 of Murfreesboro, inc., 80% managing general partner of the permittee Station WCTF(TV), Murfreesboro, Tennessee. Also 10% general partner of the permittee
	Vice President, Secretary, Director, 1.14% shareholder, Focus-Tidewater, Inc., permittee of Station WCHX-TV, Norfolk, Virginia (Focus-Tidewater)
	President, Treasurer, Director, 70% shareholder, syracuse Channel 62, Inc., licensee of Station WKAF(TV), Syracuse, New York
	Officer, Director, 30% shareholder of Media News Corporation, owner of United Press Internation
Beverly Ruhe	Director, 8.89% shareholder, Focus Joliet

[33] The Channel 59 and Channel 62 applications were granted by the Commission on January 11, 1983, as reported in an amendment granted by *Order* (FCC 83M-774) of the Presiding Judge, released March 8, 1983. By *Order* (FCC 84M-317), released January 23, 1984, the Presiding Judge accepted an amendment reporting the grant of the assignment of license of TV Station WSTV, Providence, Rhode Island to Providence Television Limited Partnership (Providence). Douglas F. Ruhe and William Geissler each own 16.75% of the stock of Television Partners, Inc., one of the general partners of Providence, UPI owns 10% of the stock of Television Partners, Inc.

[34] As noted, *supra*, Joon and Irene M. Chung divested themselves of their interests in Focus/Kannapolis in December, 1982.

[35] By *Order* (FCC 83M-780), released March 8, 1980, the Presiding Judge accepted an amendment reporting that this interest was deleted. However, the Presiding Judge ruled that this and other ownership changes would be given no consideration in resolving this case.

Name	*Interest*
	Director, 14.44% shareholder of Channel 39 of Murfreesboro, Inc.
	1.145% shareholder, Focus-Tidewater
William Geissler	Director, 8.89% shareholder, Focus Joliet
	Treasurer, Director, of Channel 39 of Murfreesboro and 100% general partner of permittee
	Vice President, Director, 1.14% shareholder, Focus-Tidewater
	President, Treasurer, Director, 70% shareholder, Greater Harrisburg Channel 59, Inc., licensee of Station WGGF(TV), Lebanon, Pennsylvania
	Officer, Director, and 30% shareholder of Media News Corporation, owner of United Press International
Judith Geissler	8.89% shareholder, Focus Joliet
	Director, 14.29% shareholder, Channel 39
	1.145% shareholder, Focus-Tidewater
Joon Chung[34]	Director, 8.89% shareholder, Focus Joliet
	1.14% shareholder, Focus-Tidewater
Irene M. Chung[34]	Secretary, Director, 8.89% shareholder, Focus Joliet
	President, Director, Channel 39
	1.14% shareholder, Focus-Tidewater
Darryl W. Anderson	Treasurer, Director, 5.61% shareholder, Focus Joliet
	2.14% shareholder, Channel 39
	.35% shareholder, Focus-Tidewater
Gloria W. Anderson	4.68% shareholder, Focus Joliet
	2.14% shareholder, Channel 39
	.35% shareholder, Focus-Tidewater
Carol J. Allen	Vice President, 15.25% shareholder, Focus-Tidewater
Carol J. Allen & Dwight W. Allen, Joint shareholders	.47% shareholder, Focus Joliet
	1.84% shareholder, Channel 39
	.95% shareholder, Focus-Tidewater
Dwight W. Allen	2.8% shareholder, Focus Joliet
Allen Investment Co.	12.16% shareholder, Focus Joliet
	.66% shareholder, Channel 39
	.325% shareholder, Focus-Tidewater
Ronald Honersty	.94% shareholder, Focus Joliet
Kongjar Goble	.94% shareholder, Focus Joliet
Kongjar Goble and Ronald R. Goble Joint Shareholders	.9% shareholder, Channel 39
	.15 shareholder, Focus-Tidewater

Name	*Interest*
Juan Caban	.56% shareholder, Focus Joliet
	.42% shareholder, Channel 39
	.06% shareholder, Focus-Tidewater
Fred H. Stewart	.56% shareholder, Focus Joliet
	.42% shareholder, Channel 39
	.06% shareholder, Focus-Tidewater
Alan Keller & Mary C. Keller, Joint Shareholders	3.74% shareholder, Focus Joliet
	.42 shareholder, Channel 39
	.215% shareholder, Focus-Tidewater
Neil McHugh	.05% shareholder, Focus-Tidewater
Sarah S. Williamson	.1% shareholder, CTV of Connecticut, Inc., permittee of Station WLCT(TV), New London, Connecticut[35]

46. The following applications have been filed in which persons with interests in Focus' application have interests as officers, directors, or shareholders (Focus Ex. 15, pp. 1, 3-4):[36]

Name	*Interest*
Telarawak Communications Co., A Joint Venture, applicant for a construction permit for Channel 15, Christiansted, Virgin Islands (BC Docket NO. 82-682)	Cabarrus Television Corp., 80% interest
	William M. Boyd, Member, Management Committee
	George E. Devault, Jr., Member, Management Committee
	George F. Rose, member, Management Committee
	Robert I. Ratcliff, member, management Committee
Focus Broadcasting of the Monterrey Peninsula, Inc., applicant for a construction permit for Channel 67, Seaside, California	Judith Geissler, 7.62% shareholder
	William Geissler, 7.62% shareholder
	Irene M. Chung, 7.62% shareholder
	Joon Chung, Director, 7.62% shareholder
	Beverly Ruhe, 7.62% shareholder
	Douglas F. Ruhe, Vice President, Director 7.62% shareholder
	Allen Investment Co., 5.66% shareholder
	Dwight W. Allen, 1% shareholder
	Carol J. Allen and Dwight W. Allen, Joint Shareholders, 1.86% shareholder

[36] These are the interests as of the time of hearing. Subsequently, Focus filed amendments reporting the filing of additional applications and the dismissal of some of those listed, *infra*. No attempt has been made to update all of this information.

Name	*Interest*
Focus Translator, Inc., application for construction permits for low power television stations in the following communities:	Juan Caban, .46% shareholder Neil McHugh, .1% shareholder Fred H. Stewart, .46% shareholder Alan Keller and Mary C. Kellery, Joint Shareholders, .42% Kongja R. Goble and Ronald L. Goble, Joint Shareholders, .30% Irene M. Chung, Director, 14.285% shareholder Joon Chung, 14.285% shareholder Judith Geissler, Director, 14.285% shareholder
Aberdeen, Washington Barstow, California Beaumont, Texas Biloxi, Mississippi Burley, Idaho Chillacothe, Missouri Cleveland, Ohio Clinton, Oklahoma Denver, Colorado Eagle Path, Texas Flagstaff, Arizona Fresno, California Greenville, South Carolina Greensboro, North Carolina Houston, Texas Junction City, Kansas Key West, Florida Minneapolis, Minnesota Nacogdoches, Texas Omaha, Nebraska Portland, Oregon Prescott, Arizona Rock Springs, Wyoming San Antonio, Texas St. Louis, Missouri Twi Falls, Idaho Tyler, Texas Vandalia, Illinois Washington, D. C. Williamsport, Pennsylvania	William Geissler, 14.285% shareholder Beverly Ruhe, 14.285% shareholder Douglas F. Ruhe, Secretary, Director, 14.285% shareholder

Name	*Interest*
Kinetications, Inc., applicant for low power television station construction permits in the following communities:	Darrell W. Anderson, Secretary-Treasurer, Director, 14.5% shareholder
	Gloria W. Anderson, 14.5% shareholder
Albuquerque, New Mexico	
Atlanta, Georgia	Kongja R. Goble and Ronald L. Goble,
Fort Worth, Texas	5%, jointly
Grand Rapid, Michigan	
Green Bay, Wisconsin	Alan Keller and Mary C. Keller, jointly,
Jackson, Mississippi	Alan Keller is Vice President, Director
Kansas City, Missouri	
Lansing, Michigan	
Little Rock, Arkansas	
Mobile, Alabama	
Philadelphia, Pennsylvania	
Rochester, New York	
Salt Lake City, Utah	
Toledo, Ohio	
Highlight Broadcasting Company, applicant for constuction permits for low power television stations in thefollowing communities:	Dwight W. Allen, 5% shareholder
	Allen Investment Co., 5% shareholder
Colorado Springs, Colorado	
Des Moines, Iowa	
Jacksonville, Florida	
Las Vegas, Nevada	
Lincoln, Nebraska	
Louisville, Kentucky	
New Orleans, Louisiana	
Peoria, Illinois	
Sacramento, California	
Seattle, Washington	
Tulsa, Oklahoma	
Wichita, Kansas	

47. Neither Focus, the applicant, nor any principals of Focus has any interest in any medium of mass communications located in Kannapolis, the Kannapolis service area, or the State of North Carolina. The direct air distance between each of the communities in which principals have an interest in a broadcast facility and Kannapolis is approximately as follows:

New Brunswick, New Jersey	490 miles
Kingsport, Tennessee	120 miles

Naples, Florida	665 miles
Brook field, Connecticut	595 miles
Torrington, Connecticut	625 miles
Montgomery County, Pennsylvania	435 miles
Joliet, Illinois	565 miles
Murfreesboro, Tennessee	310 miles
Norfolk, Virginia	285 miles
Lebanon, Pennsylvania	407 miles
Syracuse, New York	565 miles

B. Community Action Communications, Inc. (Community)

(a) Structure

48. Community is a North Carolina corporation, incorporated on January 31, 1979. However, as of September 8, 1980, the "B" cut-off date, Barber-Scotia College held 16.4% of Community's stock. One hundred percent of the stock of Community is presently held by Truth Temple, Inc. (Truth Temple), a non profit religious corporation. It is ruled that, in considering the integration factor, Truth Temple is accorded a 83.6% interest in Community.

49. The officers and directors of Community are:

D. Garland Faw	Chairman/Director
Joel V. Fowler, Jr.	President/Treasurer/Director
Anthony Jerome Watkins	Vice President/Programming
Jon Mark Russell	Vice President/Technical Operations
Ruby Elizabeth Barbee	Vice President/Public Affairs
Bobby G. Bost	Executive Vice President
Benjamin F. Mann	Vice President/Engineering
Randy S. Harkness	Vice President/Business Affairs
Patricia D. Harkness	Secretary

50. The officers and directors of Truth Temple are:

D. Garland Faw	President/Director and 33⅓% voting member
Harvey W. Fowler	Director and 33⅓% voting member

Joel V. Fowler, Jr.	Vice President/Director and 33⅓% voting member
Randy harkness	Treasurer
Patricia D. Harkness	Secretary

(Community Reformed Exs. 3 and 4; TR 647-648, 656, 736, 776-777, 813, 997)[37]

(b) Integration

51. *Dewey Garland Faw* (Faw), Chairman/Director of Community and President/Director and 33⅓% voting member of Truth Temple, will be full-time General Manager of the proposed station serving a minimum of forty hours a week. He will be in charge of the day-to-day programming, make decisions, and direct the operation of the proposed station. (Community Ex. 3; TR 778, 784)

52. Faw intends to continue to serve as pastor to Truth Temple in the event the Commission grants Community's application. At present, he spends approximately five hours per week at the church performing his duties. He explained that his congregation is not demanding of his time. He will continue to spend approximately two hours a week at hospital visitations and time studying and praying at home. He will devote at least forty hours per week performing his duties as General Manager of Community's proposed station. (TR 778)

53. Faw was born on August 3, 1938, in Landis, North Carolina. He was educated in the public schools of Landis, County of Rowan. He graduated from Landis High School in 1956. (Community Ex. 1)

54. During his high school years, Faw worked at the Winn Dixie stores part time. After graduation from high school, he enrolled in Evans Business College and worked full-time in a local cotton mill on the second shift to pay his tuition. Faw graduated with a Junior Accounting Degree. His first job after graduation was with the local hospital in the accounting department. He then went to Charlotte and was employed by Thurston Motor Lines. In less than one year, at the age of twenty-one, he was promoted to head the payroll and personnel department of this trucking company in Charlotte. From this position he was recruited by another

[37] There have never been any members of the board of directors of Truth Temple other than the three individuals listed, *supra*. There are congregational members of Truth Temple, who are called directors; however, these individuals have no voting rights on the board of directors of Truth Temple. It is the three members of the board of directors who make church policy and implement that policy. Control is vested in the Directors, who are responsible for day-to-day management. (TR 647-649) See *Memorandum Opinion and Order*, released May 18, 1982, 47 Fed. Reg. 22216.

company in Charlotte and became a part of the Mitchell Distributing Company. (Community Ex. 1)

55. Faw was active in his church. He had attended Landis Baptist Church all his life. The church asked him to be responsible for several positions. He accepted and served as Sunday School Teacher, Training Union Leader, and Choir Director. In 1960, Faw, with his wife Kay, and a 10-month old daughter, moved to attend Tennessee Temple College in Chattanooga, Tennessee to study for the ministry. He graduated with honors in three years with a Bachelor of Arts Degree in Bible and Psychology. He then accepted a pastoral call to Terre Vista Baptist Church in Chattanooga, Tennessee and served as pastor for five years. Faw began producing and directing a radio ministry from the church. In addition, the church indicated an interest in a television program. Faw produced, wrote and directed the first local church program from Chattanooga to be syndicated to five other cities. For two years, Faw traveled as an evangelist and then went back to pastor Truth Tabernacle in Chattanooga, Tennessee. (Community Ex. 1)

56. In 1972, Faw received a call from nine families in Kannapolis, North Carolina, who wished to begin a new church in the area. He agreed to come as pastor of Truth Temple. Faw began a radio ministry in Kannapolis in 1972. He produced and directed a daily program. In 1975, a weekly television ministry was started and continues to the present. It is seen each week in three major cities, Charlotte, Florence, South Carolina and Chattanooga, Tennessee. This program is produced and written by Faw. The church has purchased and paid for its own facility. Broadcast quality programs are produced each week. Faw has expertise in television equipment and production technique and has ten years of experience in the field of television. (Community Ex. 1)

57. Faw was chosen "Man of the Year" in 1979 by the Board of Directors of the largest youth camp in the nation — Peach State Bible Camp. Faw currently serves as Vice President of "Fellowship for All People." It is an organization which brings together the black segment of the community with the white segment and all other minorities in a yearly convocation of study and fellowship addressing the problems of the area. It is an organization that has promoted understanding and concern for each other in the community. Thousands come together each year as a result of this effort. Faw is a member of the Kannapolis Ministerial Association and supports the efforts and endeavors of this organization. (Community Ex. 1)

58. Faw presently resides in Salisbury, North Carolina, only a few miles from Kannapolis and within the proposed station's service area. (TR 644)

59. As noted, *supra*, at the time of the "B" cut-off date, September 8, 1980, Truth Temple owned 83.6% of the stock of Community. Thus, D. Garland Faw's 33.33% voting interest in Truth Temple translates into 27.8% integration credit as of the "B" cut-off date. Similarly, Joel Fowler, Jr.'s 33.33% voting interest in Truth Temple translates into 27.8% integration credit as of the "B" cut-off date. (Community Ex. 3)

60. *Joel Vester Fowler, Jr.* (Fowler), President/Treasurer/Director of Community and Vice President/Director and 33⅓% voting member of Truth Temple, will be full-time Sales Manager of the proposed station serving a minimum of forty hours per week. He will be in charge of all sales operations of the proposed station. (Community Reformed Ex. 3; TR 965, 966)[38]

61. Fowler, who lives in Kannapolis[39], was born January 22, 1928 at Kannapolis, North Carolina, County of Cabarrus. He attended the Kannapolis City Schools until age 16, at which time he began work at Cannon Mills. One year later he joined the United States Navy. He served 33 months in the Navy and was honorably discharged on October 24, 1947 as Seaman First Class. (Community Ex. 2)

62. Fowler resumed employment with Cannon Mills where he continued with the firm until 1953. He then was employed as a salesman for the Royal Crown Cola Distributor in Salisbury. After a year he became top salesman winning almost all of the sales contests. He worked for seven years with this company. Fowler then became sales supervisor for Cabarrus Creamery for the Salisbury area and continued with this company until a position with Piedmont Cheerwine Company was offered to him. Fowler was promoted to general sales manager and was given stock in the company and cash benefits. In 1973, Fowler accepted a position as manager of Tire Savings of Kannapolis. His position was to build and maintain a clientele of tire customers. Faw owned 50% of the company controlling this chain of tire stores. (TR 690)

63. Fowler joined Truth Temple as full-time associate pastor in April, 1978.[40] He has continued until the present in this position. His duties include assisting the pastor in each phase of pastoral duties at Truth Temple, including the television ministry of the Church. (Community Ex.

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[38] The Community application, as originally filed, proposed Fowler as General Manager on a full-time basis and the person responsible for determining all day-to-day programming and making all decisions relating to the operation of the station. (Community Ex. 8) However, on September 8, 1980, Community amended its application, made no reference to a proposed General Manager, and named a television executive board of Truth Temple, Inc., which would have day-to-day authority to control station operation. (Community Ex. 8)

[39] He lives at Route 3, Channel Road. (TR 960)

[40] He helped establish Truth Temple in 1972.

2) Fowler is the brother-in-law of Faw and the brother of Wayne Fowler. (TR 963-64)

(c) Diversification of Media

64. Neither Community, Truth Temple, Barber-Scotia College, nor any of their officers, directors or principals have any direct or indirect ownership interest in any mass media. (Community Reformed Ex. 5)

65. As noted, *supra*, D. Garland Faw, with the assistance of Joel Fowler, produces and syndicates a weekly religious television program for Truth Temple which is on television stations in Charlotte, North Carolina; Florence, South Carolina; and Chattanooga, Tennessee. (Community Ex. 1; Focus Ex. 1, p. 3; TR 676-78)

II. Court Rulings With Respect to Reverend and Mrs. Dewey Garland Faw (Faw)

66. The Presiding Judge, by *Memorandum Opinion and Order* (*Order*) (FCC 82M-2959), released September 24, 1982, enlarged the issues in this proceeding to include an issue to determine the impact of two judicial decisions on the qualifications of Community. As more fully detailed, *infra*, these two rulings concerned certain conduct on the part of Faw and his wife. One of these rulings concerned a finding that Faw and his wife had made a fraudulent conveyance of real property in 1976 in order to place the property beyond the reach of creditors. The other ruling held that Faw and his wife had conveyed fraudulently a second parcel of real property in 1978, and falsely represented their total assets on a bankruptcy petition filed in 1980.

67. The Presiding Judge, in the *Order* (para. 10) enlarging the issues noted that the fact situation in this case was distinguishable from *WHW Enterprises, Inc.* 89 FCC 2d 799 (Rev. Bd. 1982) in that in this case the local authorities had made a finding of fraud. During the October 8, 1982, further conference, the presiding Judge emphasized that it was a limited issue; namely, the impact of the Court holdings and that there would not be a relitigation of the merits of the rulings other than to permit Community to offer evidence in mitigation. (TR 114-118, 122)

(a) The Ruling In The Cooper Tire And Rubber Company Lawsuit

68. On November 30, 1978, a United States District Court Judge in the District Court of the United States for the Western District of North Carolina, Charlotte Division issued a "Summary Judgement Setting Aside Fraudulent Conveyance in the lawsuit entitled *Cooper Tire and Rubber Co.* v. *Tire Savings, Inc., et al.* The Judge ruled that on September 28, 1976, Faw and his wife conveyed their residence to Truth Temple with the intent to place the property beyond the reach of creditors. The Judge

ruled that the conveyance satisfied the definition of fraudulent conveyance as described in *Aman* v *Walker*, 165 N.C. 224, 81 S.E. 162 (1914).

69. The Judge, in setting aside the conveyance, made the following findings (Focus Ex. 18, p. 2):[41]

(a) The church agreed to accept the conveyance so "long as such change (of ownership would) not represent any financial cost or charge to the church . . ." according to the church's minutes concerning that agreement.

(b) The church paid nothing for the property.

(c) It was agreed that the Faws would continue to reside in the property.

(d) The Faws *retained the option to have the property re-conveyed to them without charge upon their request.* (under scoring not added)

(e) Mr. Faw's salary from the church was reduced by the amount necessary for the church to make payments on the first mortgage lien the Faws had placed on the property.

(f) It was agreed that Faw's salary would be increased by the amount of the mortgage payments should the Faws subsequently elect to have the property reconveyed to them.

(g) At the time of conveyance, the Faws did not retain enough property to pay their existing obligations.

(h) In September, 1976, Tire Savings owed Cooper Tire more than $112,000.00 for tires and other materials sold and delivered and the Faws were guarantors of this debt.

(i) The conveyance was made with the intent to place the property beyond the reach of creditors.

(b) Mitigation Evidence re Cooper Tire Holding

70. Faw maintained that there was no intent to place the property beyond the reach of Cooper Tire and that, in fact, he gave no thought to the Cooper Tire relationship at the time of conveyance. Faw explained that he conveyed his home to Truth Temple because as a church asset it would enable the church to acquire a mortgage for a new auditorium and also, because he had been advised that Church ownership of the home would result in the debts assumed by the church being tax deductible, resulting in personal tax benefits to Faw. (Community Ex. 6, pp. 2-3; TR 747, 789-90, 814-15)

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[41] The Judge, also found that Cooper Tire and Rubber Company (Cooper Tire) sold tires to Tire Savings, Inc. (Tire Savings); that this account was guaranteed by the Faws; that the account was delinquent; that suit was brought and summary judgement rendered on January 6, 1978, for Cooper Tire in the amount of $78,852.74 against Tire Savings and the Faws; and that judgment was entered on February 27, 1978. (Focus Ex. 18, p. 1) The $78,852.74 was the amount owed to Cooper Tire after the inventory of Tire Savings had been repossessed, and Cooper Tire had taken possession of Tire Savings' accounts receivable. (Focus Ex. 17, p. 2; Focus Ex. 18, p. 1; TR 755-59)

(1) Construction of Truth Temple and Faw's Residence

71. In March, 1972, D. Garland Faw (Faw) and his family moved from Chattanooga, Tennessee to Kannapolis, North Carolina, to establish a non-denominational church. At that time, Faw began a new church congregation with approximately nine families, which became known as Truth Temple. (Community Ex. 6, p. 1; TR 722)

72. The four goals that were set forth for the new church, were: (1) to build a church building for worship; (2) to establish a television ministry; (3) to acquire property for an old-age retirement village; and (4) to establish a Christian school. (Community Ex. 6, p. 1)

73. Shortly thereafter, in 1972, Truth Temple began looking for a piece of property for the construction of a church, and located nineteen acres of land which was being sold for $32,000. The church congregation, being quite small at the time, could not borrow enough money to buy the land, even though every family expressed a willingness to sign a note with the local bank. The church did not have security to purchase the land. (Community Ex. 6, p. 1; TR 722)

74. In order for the church to purchase this land, Faw agreed to purchase 6 acres of the 19 acres and paid $9,000 in cash for the property. With this $9,000, the church was able to purchase a thirteen-acre tract of land and was able to obtain a construction loan to begin construction of the church. (Community Ex. 6, pp. 1-2; TR722-24)

75. That same year, the church acquired a construction loan from the Concord National Bank and a commitment from Citizens Savings and Loan regarding the building of a church structure. It was necessary that Faw and his wife sign personal guarantees to secure these monies. Due to a disagreement with Citizens Bank, the Cabarrus Bank authorized additional funds to complete construction of the church. The Bank took over the previous loans upon the guarantee of Faw and his wife of all the notes and mortgages of the church. The loan for $72,000 was made. (Community Ex. 6, p. 2)

76. Construction began on a residence for the Faws in early summer, 1973, and was finished in December, 1973, on the six acres Faw had purchased in 1972.[42]

(2) Faw's Reasons For the September 28, 1976 Conveyance of His Residence To Truth Temple

77. Faw explained that the primary motivation behind the conveyance of his property to the church was his desire to enable the church to secure a loan, which would have otherwise been unavailable. According to Faw,

[42] Faw had obtained a $42,000 loan. (Community Ex. 6, p. 2) Faw and his wife started living in this house in 1973 and continued to live in the house after title was transferred to Truth Temple in September 1976. (Community Ex. 6, p. 2)

Truth Temple desired to build an auditorium but the property then owned by the church was insufficient to use as collateral to obtain adequate financing for constructing such a building. The First Union National Bank advised Faw of this fact, and made known that it would consent to lend Truth Temple money only if the property owned by Faw was made a part of the church's assets and pledged as additional security by the church. Faw explained that he and his wife conveyed their property to the church so that the church would have the necessary security when it procured a loan for building the auditorium. The Bank loaned $80,000 to the church. (Community Ex. 6, pp. 2-3; TR 789-90, 979)

78. Faw further explained that a second reason for the conveyance was the tax benefits to be derived from such a transfer. Faw had previously been advised by his accountant that there would be a tax advantage accruing to him if his property were contributed to the church to be used as a parsonage at that time. Faw understood that he would receive a tax deduction as a charitable contribution for the difference between the market value of his land and the amount of the mortgage assumed by the church. Later, however, he learned that there would be no tax advantage derived from the conveyance due to the fact that he had reserved an option on the property to receive it back after the church mortgage was paid. (TR 817, 980) Faw's main concern was that he and his wife have a place to live for the present, and that his wife have a place to live in the event of his death. Faw maintained that in conveying the property he did not consider that the property would be re-conveyed back to him and his wife at any specific time in the future. (Community Ex. 3, p. 3; TR 746-47, 790)

79. As noted, *supra*, Faw maintained throughout this proceeding that at no time during the process of conveying his property to Truth Temple did he ever consider what ramifications the conveyance would have with respect to Tire Savings' ongoing relationship with Cooper Tire.[43]

(3) History of Tire Savings' Relationship with Cooper Tire

80. In 1973, Master's Corporation d/b/a Tire Wholesalers (Masters) contacted Cooper Tire, a tire manufacturer, for the purpose of purchasing tires on a credit basis. (TR 1026) The standard procedure at Cooper Tire for determining whether and how much credit to extend was the following: a new account form had to be submitted, with financial statements attached. Guarantees of the principals would be sought, if necessary. Subsequently, credit references, trade references, and bank references would be checked. (TR 1026-26) This procedure was followed with respect to Master. (TR 1027) Master's was reorganized in 1975, becoming Tire Savings. A new guarantee was sought by Cooper Tire and

[43] This relationship is discussed, *infra*.

signed by Garland Faw and his wife on September 13, 1975.[44] (TR 730, 825, 876, 1027-30; Focus Ex. 21)

81. The September 13, 1975 guarantee provided that the accounts of Tire Savings would be personally guaranteed by Faw and his wife. (Focus Ex. 18, p. 1; Community Reformed Ex. 6A, p. 11; TR 730, 1027) The Faws promised prompt and punctual payment of the purchase price of all goods which had been sold and thereafter would be sold by Cooper Tire to Tire Savings. (Focus Ex. 21, p. 1) The guarantee was accompanied by a financial statement of the Faws. The guarantee stated: "Such financial statement is submitted for the purpose of substantiating the reliability of each of the undersigned as to this guaranty, it being understood that Cooper Tire & Rubber Company will be notified immediately in writing of any change in the financial condition of the undersigned."[45] (Focus Ex. 21, p. 2; TR 1096) The financial statement, dated September 30, 1975, listed the joint assets of Faw and his wife with assets totalling $202,300, $56,000 in liabilities, for a net worth of $146,300. Among the specific assets listed were: Real Estate, $82,000; Master's Corp., $75,000. (Focus Ex. 21, p. 4; TR 1103)

82. At or about the time that the guarantee was signed in 1975. Walter Patterson, then Cooper Tire's director of credit, met with Faw at Faw's request.[46] (TR 1030-31) The purpose of the meeting was to explore whether additional credit requested by Faw might be extended to the new entity, Tire Savings. At that meeting, Faw and Patterson discussed the financial condition of the new corporation as well as the financial condition of the Faws. As a result, credit privileges were maintained, but not increased. (TR 1030-34)

83. Cooper Tire considered the personal guarantee of the Faws to be essential to the extension and continuation of any credit to Tire Savings. (TR 1027, 1067, 1090-91) At no time during 1975 or 1976 did Faw appear to Patterson to have any significant assets besides his residence. At the meeting in the fall of 1975, Patterson discussed with Faw the financial condition of Faw and his wife, and stressed that additional credit would not be made available since "the only real assets shown on the balance sheet of the Faws was their personal home." (TR 1034, 1965)

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[44] Faw was President and one of the two shareholders of Tire Savings.

[45] Faw maintained that in guaranteeing Tire Savings' payments, he did not understand that Cooper Tire could proceed against his personal assets. According to Faw, in guaranteeing Tire Savings' account, he believed that Cooper Tire could only proceed to take back its merchandise sold to Tire Savings. He explained that it was not until he met with corporate officials from Cooper Tire in October 1980 that he became aware that Cooper Tire could attach his other assets. (TR 752-54, 756, 757)

[46] Patterson held this post until 1979, when he resigned to join a tire dealership organization in Florida. (TR 1025, 1078)

84. In September 1976, Tire Savings, Inc. owed Cooper Tire & Rubber Company more than $122,000 for tires and other materials which had been sold and delivered.[47] (Focus Ex. 18, p. 2, TR 825, 1061) The amount past due at that time was approximately $70,000. (TR 1049) On or about September 10, 1976, Cooper Tire informed Tire Savings that Cooper Tire would ship no more tires on credit to Tire Savings. (Focus Ex. 18, p. 3, para. 4; TR 1039-40) That fact was personally communicated by Patterson by telephone to Faw. (TR 1025, 1039) Patterson told Faw that no further credit privileges would be extended because the Tire Savings account had been thrown into default in early September, 1976, when Cooper Tire deposited the $34,000 Tire Savings check[48] and was later informed by Tire Savings on or about September 2 that a stop payment order had been issued.[49] Patterson told Faw that Tire Savings' further credit privileges were denied because its account was in default. (TR 1035-39)

85. Patterson, when questioned in this proceeding, explained that, consistent with ordinary business practices of the tire industry, Tire Savings operated on a 30/60/90 basis: One-third of any invoice was due on the 10th of the next month following shipment, the second third on the 10th of the following month, and the remainder on the 10th of the next month. When payment was stopped for all amounts then due or past due, the account was thrown into default. (TR 1044-45)

86. As a result of the series of discussions shortly after September 10, 1976, Cooper Tire agreed to ship additional tires to Tire Savings, but only on a cash-payment basis. (TR 1035, 1039-41) Faw agreed to send a $10,000 check to obtain tires valued in a similar amount.[50] (TR 1040) Patterson related that two shipments of tires were made from the Atlanta warehouse on the 16th and 17th of September, valued at $15,000, or $5,000 in excess of what had been promised by Cooper Tire. (TR 1041-42, 1050, 1086) They were delivered within 48 hours of their shipment, according to delivery receipts in Cooper Tire's files. (TR 1041, 1050, 1099; Focus Ex. 18, p. 3, para. 5) Faw personally sent a $10,000 check to Cooper Tire which was received in Findlay, Ohio, a few days after the shipments were made. (TR 731, 1041, 1056) However, on September 24, 1976, Faw stopped

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[47] Prior to September 1976 there had been discussions with Cooper Tire concerning delays in the shipment of tires to Tire Savings.

[48] This was the check owed to Cooper Tire as of August 10, 1976 and received by Cooper Tire in late August.

[49] The check was returned by the bank approximately two weeks later, bearing an indication that payment had been stopped. (TR 1035-38)

[50] Faw claimed that he had never been advised that Tire Savings' credit privileges had been revoked. He acknowledges, however, that he was advised that, if Tire Savings paid $10,000, Cooper Tire would ship some tires, "while they were working out extended terms so we could go back to regular shipping dates." (TR 828)

payment on the $10,000 check.[51] (Focus Ex. 18, p. 3, para. 5; TR 730, 1049) This stop-payment order was not reported by Faw to Cooper Tire. The check was returned to Cooper Tire by the bank on or about October 11 for insufficient funds. Cooper Tire redeposited it, and on or about October 15, Cooper Tire was informed by the bank that Faw had issued a stop order on the check on September 24, 1976. In the interim, there had been a meeting held on October 6, 1976, attended by both Patterson and Faw in an unsuccessful effort to restore credit privileges to Tire Savings.[52] Faw made no reference to the stop order during this meeting. (TR 1049, 1055-57)

87. As noted, *supra*, under the terms of the guarantee, Cooper Tire was to be notified immediately in writing of any change in the financial condition of the Faws. Such notification was not given. Cooper Tire was unaware of the conveyance of the Faws' residence until October 1977, when it learned of it through its local counsel in Charlotte, who was then engaged in preparation for the litigation with Tire Savings. (TR 1058-59, 1099) No reference to the conveyance had been made at the meeting held on October 6, 1976 between Patterson and Faw, held to consider whether Tire Savings' credit privileges could be restored. (TR 1046-47) As noted, *supra*, Faw had not informed Cooper Tire of the September 24 stop-payment order on the $10,000 check at that meeting. (TR 1049, 1055-59, 1087, 1099, 1111) During the October 6, 1976 meeting, patterson had reviewed Faw's personal assets, particularly his house and its mortgage. (TR 1070-71)[53] This review of Faw's financial statement included specific reference to the valuation of Faw's real estate and the mortgage on this property in order to determine its equity. (TR 1070-73)[54]

88. Faw explained that all of the conversations that were held with Cooper Tire officials in September 1976 had been pleasant, and he was under the impression that things could be worked out, and that Tire Savings could have a continuing satisfactory relationship with Cooper Tire. (TR 1088, 1117) In September 1976 Faw believed that the relationship between Cooper Tire and Tire Savings could be worked out amicably

[51] As noted, *supra*, Faw and his wife conveyed their residence, which they owned and in which they lived, to Truth Temple on September 26, 1976. The residence had an equity value of approximately $60,000. (Focus Ex. 18, p. 3, para. 8; TR 1059) Faw claimed that he stopped payment on the $10,000 check because Cooper Tire had not shipped the tires to Tire Savings. (TR 891-92)

[52] Patterson acknowledged that Cooper Tire was "happy to do business" with Tire Savings in September 1976. (TR 1083-84)

[53] As noted, *supra*, Cooper Tire initiated a law suit against Tire Savings and the Faws to recover the monies which was then owed to Cooper Tire

[54] Faw, at this time, did not inform Patterson that this property had been conveyed to Truth Temple.

for both sides.[55]

89. Faw further explained that he did not understand the obligations of a guarantor as fully as he does now. He understood at that time that he was personally responsible to pay the bill, but did not realize when he signed as a guarantor that it could be a "fixation" on his house. (TR 751-52) Faw maintained that it was his belief, at the time of the conveyance of his home, that Tire Savings had sufficient assets to pay its debts to Cooper Tire since Tire Savings had inventory worth about $100,000.00 in September, 1976. (TR 826-27)

(c) Ruling in Faw's Bankruptcy Proceeding

90. As noted, *supra*, on January 6, 1978, a $78,855.74 judgment was rendered in the United States District Court in favor of Cooper Tire against the Faws and Tire Savings. On or about February 2, 1978 the Faws deeded to Joel Fowler, Jr. a one-half interest in a portion of real property (lots 21-26) owned in part by the Faws and in part by Mrs. Faw's parents.[56] (Focus Ex. 17, p. 2, para. 3; Community Ex. 6, p. 5; TR 693-96, 848) The Faws did not convey lots 27 through 36, the undeveloped portion of this property.

91. On September 24, 1980, the Faws filed for personal bankruptcy in the United States Bankruptcy Court, Western District of North Carolina, Charlotte Division. (Focus Ex. 17, p. 1, para. 1; TR 882) The listing of assets by the Faws did not include the property (lots 21 through 26) which had been conveyed by deed dated February 2, 1978, by the Faws to Joel Fowler. (Focus Ex. 17, p. 1, para. 1; p. 2, para. 3; TR 846, 994)

92. This bankruptcy proceeding was entitled *In the Matter of Dewey Garland Faw and wife, Kay M. Faw.* In his "Findings of Fact and Conclusions of Law," issued June 1, 1981, U.S. Bankruptcy Judge Marvin R. Wooten concluded that the Faws made the conveyance (lots 21-26) with an actual intent to defraud all of their creditors, and Cooper Tire in particular. (Focus Ex. 17, p. 4) Judge Wooten made reference to the "suspicious circumstances" surrounding the conveyance of lots 21-26 to Fowler; namely, the relationship between the Faws and Fowler; the private manner in which the "sale" was conceived and conducted, the nature of the consideration, the timing of the conveyance, the fact that the Faws retained possession and treated the property as their own for all purposes, including agreeing to bear any losses incurred. The Judge also

[55] Patterson of Cooper Tire acknowledged that, as late as November 1976, he had not notified Faw that Cooper Tire would sue Tire Savings. (TR 1054-55, 1093-94)

[56] The conveyance was Faw's idea; he paid his attorney to prepare the deed and the note which, Fowler, the preacher, submitted in payment. (TR 983, 994)

found that Fowler had "full notice" of the Faws' fraudulent intent.[57] (Focus Ex. 17, pp. 3-4)

93. Judge Wooten further found that the Faws' failure to list lots 27 through 36, which had not been conveyed, was done "knowingly and fraudulently" and constituted a false oath and that Faw repeated this false oath in his failure to make disclosure in response to questions of the Trustee at the first meeting of credition. (Focus Ex. 17, pp. 4-5)

94. The Judge rejected Faw's contention that he and his wife had intended to convey lots 27 through 36 to Fowler, in addition to lots 21-26, and that the failure to convey them was the result of an inadvertent oversight by Faws' lawyers in Concord, North Carolina, who prepared the deed for conveyance. The Judge noted that the Faws made no effort to secure supporting testimony from the lawyers.

95. In a subsequent Order, dated December 1, 1981, Judge Wooten further characterized his own previous findings as follows: "It appears to this Court that the debtors [Garland Faw and his wife] have engaged in a continuous effort to defraud Cooper Tire of its claim, and evade its obligations to that creditor." (Focus Ex. 10, p. 4, para. 2) As a result, Judge Wooten ordered the voluntary bankruptcy which had been filed under Chapter 13 to be converted for cause to Chapter 7 of the Bankruptcy Act, thereby permitting Cooper to participate in any distribution that would be ordered. (Focus Ex. 10, pp. 4-5, paras. 1-2, 4) In taking this action, Judge Wooten reiterated his characterization of the Faws' action as a "continuous effort to defraud." (Focus Ex. 10, p. 5, para. 4)

(d) Mitigation Evidence re Bankruptcy Ruling

96. As noted, *supra*, the Faws had not listed certain real estate as an asset in their bankruptcy case.[58] The Faws had transferred, in February, 1978, their one-half interest in property (lots 21-36) located on Lane Street to Joel V. Fowler, in return for Fowler's assumption of Faw's payments and an $8,000 promissory note executed by Fowler. The Faws assigned the note to their lawyer to pay the attorney fees arising from the Cooper Tire litigation. The entire parcel of property in question consisted of a large developed lot (lots 21-26, occupied at one time by Tire Savings) on which commercial buildings were situated, plus a number of small, adjoining lots (lots 27-36), which were used to store tires and other miscellaneous items. Faw persists that it was his intention to convey the Faws' one-half interest in the entire property to Fowler (lots 21-36), but

[57] The Judge also observed that Mrs. Faw managed the property, collected rent, paid taxes on the property, made the mortgage payments and treated all income received and expenses incurred with respect to the property as their own for tax purposes.

[58] The Faws did list their personal residence as an asset on their petition for bankruptcy since by September 24, 1980, the date they filed their petition in bankruptcy, the property had been re-conveyed to them. (Focus Ex. 17, p. 1; TR 885-86)

that the attorney responsible for preparing the deed of trust inadvertently omitted the small lots (lots 27-36) in a description of the property.[59] Only lots 21-26 were transferred. Faw explained, during this proceeding, that these small, undeveloped lots had no value separate from the larger property on which the buildings were located and that it served no purpose for him to retain an interest in this property. (Community Ex. 6, pp. 5-6; Focus Ex. 17, pp. 3, 4; TR 696-97, 703, 853)[60]

97. Faw maintained that the one-half interest in this property was not conveyed in order to remove it from creditors, particularly Cooper Tire. He explained that he knew that the ownership of the property was a matter of public record and that at no time during the fourteen-month litigation between himself, Tire Savings, and Cooper Tire had Cooper Tire shown any interest in proceeding against this land. He, therefore, assumed that Cooper Tire was not interested in that property. The amount of the indebtedness owed Cooper Tire had been ruled to be approximately $78,000. Faw contends that the parsonage, which had already been attached by Cooper Tire, had an estimated value in excess of that amount; and that when Faw transferred his one-half interest in the property, he did not believe he was doing anything incorrect or improper.[61] (TR 758-59)

98. Faw explained that when he filed for Chapter 13 bankruptcy on September 1981 he failed to include lots 27-36 as part of his assets, since he thought that he had already conveyed them to Joel Fowler in 1978. According to him, it was only during the course of bankruptcy proceedings that he was advised that the lots had, in fact, not been properly transferred. Faw agreed to retransfer the smaller lots to Fowler as originally intended, but this was not acceptable to the Judge for purposes of rehabilitating the bankruptcy request. As noted, *supra*, the Judge found that the property should have been included in a list of Faw's assets.

99. The bankruptcy action was declared invalid. The Judge ruled that Faw had engaged in a continuous fraud on Cooper Tire. Faw then borrowed funds to pay the obligation of Tire Savings to Cooper Tire, and a settlement was reached in February, 1982. (Community Ex. 6, p. 6; Focus Ex. 10, pp. 4-5; Focus Ex. 17; TR 703-04, 769-70)

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[59] This contention was rejected by the United States Bankruptcy Judge. (Focus Ex. 17, p. 4)

[60] Faw further explained that at the time of the conveyance, he believed the property on Lane Street to be worth approximately $50,000. Approximately $34,000 was owed on a note to the bank and, as a result, he thought that $8,000 (one-half of the $16,000 equity in the land) was a fair price. (TR 983)

[61] The record evidence does not establish when the parsonage had been reconveyed to the Faws or that it had been attached by Cooper Tire for payment on the judgment at any time in February 1978. In fact, the parsonage was listed as an asset of the Faws in the bankruptcy proceeding. (Focus Ex. 17, pp. 1-2)

Ultimate Findings and Conclusions

1. Focus Television Co., a Joint Venture (Focus) and Community Action Communications, Inc. (Community) are mutually exclusive applicants for a new commercial television station to operate on Channel 64, Kannapolis, North Carolina. In addition to the comparative issue which has been specified relative to the choice to be made between these two mutually exclusive proposals, there are qualifying issues which have been designated against the applicants. These qualifying issues must be resolved in favor of the applicants before either is entitled to comparative consideration with the other. It is well established that only basically qualified applicants are entitled to comparative evaluation. *Louis Adleman*, 28 FCC 432 (1960), affirmed, *sub nom.*; *Guinan Realty Co. v. FCC*, 111 U.S. Appl., D.C. 371; 297 F. 2d 782 (1961)

2. As detailed in the preliminary statement, issues had been specified to determine whether principals of Focus misrepresented or were lacking in candor to this Commission with respect to the tendering of a "Joint Request for Approval of Agreement" on February 1, 1980 and whether these principals intended to circumvent the then restriction against excessive reimbursement in connection with the dismissal of an application. The parties to this proceeding agreed that these issues would be tried before Presiding Judge Joseph P. Gonzalez since the issues were similar in nature to issues already designated in the Hammond, Indiana proceeding.[62] Judge Gonzalez has issued a Preliminary Initial Decision in which it is concluded that the facts with respect to the dismissal agreement did not involve misrepresentation or lack of candor or an attempted circumvention of the restriction on excessive reimbursement. Judge Gonzalez concluded that the evidence adduced with respect to this matter did not impact on the basic qualifications of Focus and did not warrant the assessment of any comparative demerit.[63]

3. The Presiding Judge, by *Memorandum Opinion and Order* (FCC 82M-2959), released September 24, 1982, enlarged the issues to determine the impact of the rulings in *Cooper Tire and Rubber Co. v. Tire Savings, Inc. et al.*, and *In re: D. Garland Faw and wife, Kay W. Faw,* upon the basic and/or comparative qualifications of Community to be a licensee. The findings of the Court in the two cited proceedings are fully set forth in the findings, as is the mitigation evidence offered by Faw in this proceeding relative to these matters. The Court in the *Cooper Tire* proceeding ruled that Faw had conveyed his residence to Truth Temple with the intent to place the property beyond the reach of creditors. In the bankruptcy proceeding, the Court found that Faw and his wife had

[62] Issuance of an Initial Decision in this proceeding was withheld pending resolution of the issues in the Hammond, Indiana proceeding.

[63] *Apogee, Inc.*, (FCC 84D-8), released February 13, 1984.

engaged in a continuous effort to defraud Cooper Tire, the creditor, and to evade their obligation to this creditor. The facts offered in mitigation do not measurably dilute the Court holdings relative to Faw's behavior in attempting to transfer his residence so that it would not be subject to the claims of a creditor.

4. However, the Commission has made clear that past misconduct is to be reviewed to the extent that "predicative judgment" can be made about future broadcast performance. The Review Board has stressed that the relevant considerations are the nature, frequency and currency of the misconduct, as well as the relationship of the wrongdoer to the applicant. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 592-593 (Rev. Bd. 1982) There is no disputing that Faw is an important principal of Community. In evaluating the other factors, it is appropriate to note that the transfer of the Faws' residence, which was found to constitute a fraudulent transfer, occurred more than seven years ago. The matters which were the subject of the bankruptcy proceedings occurred in 1978 and 1980.

5. The Presiding Judge agrees with Community that this Commission must make its own independent judgement as to whether certain conduct or behavior bears upon the probable operation of a broadcast facility. The incident involving the Faws related to a business dispute relative to a retail tire enterprise and the actions of the Faws in transferring property so that it was not subject to the claims of a creditor. While the Faws' behavior regarding this matter cannot be condoned, it appears that the events were isolated and there is no indication that it represents a pattern of behavior. For these reasons, it is concluded that the wrongdoing has little or no predicative value on prospective compliance with the Commission's Rules and policies. *Central Texas, supra*; *NLT Corp.*, __ FCC 2d __; 52 RR 2d 817, 823 (Commission 1982)

6. The contention of Focus that Faw was guilty of misrepresentation or a lack of candor in his testimony in this proceedings is rejected. As noted by Focus, Faw's testimony differs from that of Patterson, a former Cooper Tire official, in certain respects. The findings relative to this matter are fully detailed, *supra*, and need not be repeated. It is concluded, on the entirety of the record evidence, that there is no material conflict in testimony warranting a finding of misrepresentation by Faw. Unquestionably, there was a difference of recollection concerning the negotiations between Faw and Cooper Tire as to their credit relationship. However, the record shows that these negotiations were of a continuing nature and that it was not unreasonable for Faw to believe that they had not been terminated and might, ultimately, be successful.

7. The Presiding Judge is of the view that Faw made a good faith effort to recall and relate the facts with respect to the Cooper Tire

incident and his state of mind at the time. Understandably, his recollection and the conclusions that flowed therefrom as to the positions of the negotiators were not in full agreement with that of Patterson. However, the Presiding Judge carefully observed Faw and did not note any evasiveness on his part. It is ruled that the record evidence does not warrant the conclusion that Faw either misrepresented facts or was lacking in candor in his testimony in this proceeding.

8. It is concluded that Community possesses the requisite qualifications to be a Commission licensee. It is further concluded that, for the reasons articulated, *supra*, no comparative demerit will be assessed against Community relative to these matters.

9. Having found both applicants basically qualified, it is now appropriate to turn our attention to the comparative choice to be made in this proceeding. The Commission, in its *Policy Statement of Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965), emphasized that the two primary objectives to be accomplished in making the comparative choice are to obtain the best practicable service to the public and to achieve maximum diffusion of control over the media of mass communications. The Commission has consistently stressed the importance of the diffusion of mass media control. Neither Community, the applicant, nor any of its principals have any other broadcast or media interests. Focus, on the other hand, has extensive media interests. The broadcast interests held by principals of Focus are detailed in paragraphs 42 and 44 of the findings and represent interests in AM, FM and television stations, as well as interests in cable systems, a daily newspaper, weekly newspapers and United Press, a national news service. However, none of these media interests are located in Kannapolis, within the proposed television service area or in North Carolina. It is recognized that these interests are diffused, ranging as they do from Florida to Connecticut and as far west as Illinois. It is concluded that Community is entitled to a moderate preference over Focus under the mass media criterion. While it might be argued that Focus' holdings do not result in regional concentration, they are significant in terms of numbers. For this reason, it is ruled that the extensive nature of the media holdings warrants assessing a moderate preference. The *O.T.R.H., Inc.*, __ FCC 2d __; 54 RR 2d 989 (Rev. Bd. 1983)

10. Effectuation of the "best practicable service to the public" objective entails the appraisal of the proposed participation of the applicants' principals in the operation of the proposed facility. This criterion is best measured through the aspect of ownership participation in the day-to-day operation of the station, a quantitative consideration subject to qualitative enhancement by such factors as the local residence of the principals, their participation in community affairs in the proposed city of license and their previous broadcast experience. Day-to-day

participation in the operation of the proposed station by minority and/or female principals is also a matter of qualitative enhancement.

11. Community is presently owned 100% by Truth Temple. However, as of September 8, 1980, the "B" Cut-off date, Truth Temple held an 83.6% interest in Community. The Commission has long held that an applicant will not be permitted to upgrade their comparative position and gain a comparative advantage over their adversary after the cut-off period. *The New Continental Broadcasting Company*, _ FCC 2d _ (Rev. Bd. 1981) It is, therefore, ruled that for the purpose of this proceeding, Truth Temple will be considered to have an 83.6% interest in Community. Two of Truth Temple's three voting members will be integrated on a full time basis into the operations of the proposed station. Dewey Garland Faw (Faw) will be the full time general manager in charge of day-to-day operation of the facilities and Joel V. Fowler, Jr. (Fowler) will be the full time sales manager.[64] The 66.66% voting interest in Truth Temple held by Faw and Fowler translates into a 55.8% integration interest in Community. Therefore, Community is credited with that percentage integration interest. Both Faw and Fowler live within the service area and Faw has been the minister of Truth Temple and has been a member of the Kannapolis ministrial association. Additionally, both Faw and Fowler have gained experience in the television ministry through the programming which they have produced for a number of years.

12. Five principals of Focus are proposed as integrated on a day-to-day basis in the operation of the proposed station. However, one of them, Kathryn Boyd Rapp, who is credited with a 5.8% derivative interest in Focus, has made clear that she intends to devote whatever time and effort is required to her family and to give those duties the highest priority. She has represented that, while it is her intention, eventually, to work at the station, she could not predict a day for such employment or, in fact, guarantee that such employment would ever occur. It is ruled that this represents too contingent a commitment to be credited as part of Focus' integration proposal. Hugh M. Boyd, who has a 5.8% derivative interest in Focus, will be the full time station manager; John D. Boyd, who also has a 5.8% derivative interest in Focus, will be the production manager; James G. Wilks, who holds a 1.65% derivative interest in Focus will be the sales director and Ronald Honesty, who holds an 8.5% derivative interest[65], will be the program director. Both Wilks and Honesty are Blacks and are accorded an enhancement credit. Focus' integration proposal represents

[64] The third voting member of Truth Temple will not be integrated into the operation of the proposed station.

[65] While Honesty presently holds a 13.5% interest in Focus, as of the "B" cut-off date, he held a 8.5% interest and it is this interest for which he will be credited.

15.9% of its ownership.[66] None of these individuals are presently residents of Kannapolis, nor do they reside within the proposed service area. However, all are committed to move to Kannapolis in the event of a grant. The Presiding Judge agrees with Community that both Wilks and Honesty can be credited, respectively, with the position of assistant sales director and assistant program director. It is ruled that while the qualitative attributes of participating owners may enhance the value of an integration proposal, it cannot overcome a clear quantitative difference. *New Continental*, cited, *supra*. We have such a "clear quantitative difference" here in that the integrated Community principals represent a controlling interest whereas the integrated Focus principals represent only a 15.9% ownership interest. A substantial preference must be awarded to Community relative to the integration of ownership and management.

13. In summary, it is concluded that Community is to be preferred both from the view point of diffusion of the mass media and integration of ownership and is awarded the permit as the comparatively superior applicant.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276(d) of the Rules, 47 CFR 1.276(d)[67], the construction permit application of Community Action Communications, Inc. for a new television station on Channel 64, Kannapolis, North Carolina IS GRANTED and the application of Focus Television Co., a Joint Venture, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Acting Chief Administrative Law Judge*

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[66] Focus' argument that the "management team" directs the joint venture and that Focus should be credited with 100% integration is rejected. While Focus is a joint venture, there are individuals with ownership interests in the joint venturers who control the applicant. These individuals have chosen the management team and members can just as easily replace them. Control of Focus does not vest with the management team.

[67] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release, pursuant to 47 CFR 1.276(d).

Application for Review
Application Unacceptable
Cellular Communications Systems

Applications for review of staff's action returning as unacceptable for filing of applications to establish cellular systems denied based on administrative efficiency, regularity and fairness.
—*Green Country Mobilephone, Inc.*

FCC 84-180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of
Green Country Mobilephone, Inc.

For a construction permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Tulsa, Oklahoma Standard Metropolitan Statistical Area
South Texas Mobilephone, Inc.

For a construction permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the San Antonio, Texas Standard Metropolitan Statistical Area

Swallow Communications

For construction permits to establish new cellular systems operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Albany-Schenectady-Troy, New York Standard Metropolitan Statistical Area, and to serve the Bridgeport-Stamford-Norwalk-Danbury, Connecticut New England County Metropolitan Area

MEMORANDUM OPINION AND ORDER

Adopted April 26, 1984; Released May 15, 1984

BY THE COMMISSION:

1. Presently before the Commission are applications filed by Green Country Mobilephone (Green Country), South Texas Mobilephone (STM), and Swallow Communications (Swallow), for review of the action taken by the Common Carrier Bureau (Bureau), returning as unacceptable for filing the above-captioned applications to establish new cellular systems in Tulsa, Oklahoma; San Antonio, Texas; Albany-Schenectady-Troy, New York; and Bridgeport-Stamford-Norwalk-Danbury, Connecticut. *Green Country Mobilephone, Inc.*, CC Mimeo 1911, released January 24, 1983 (*Order*). The applications were submitted for filing one day late, on November 9, 1982.[1] Oppositions to these applications for review were submitted by American Mobile Communications (Amcom), United Cellular Network, Cell-Fone of San Francisco (Cell-Fone), and LDS Cellular (LDS). Also before the Commission are Motions for Stay of Proceedings from STM and Green Country, and Oppositions to these motions from Amcom, Cell-Fone, LDS and San Antonio Mobile Telephone Company. Relies have been filed by all three applicants.

2. Having reviewed the pleadings, the prior decisions, and applicable Commission precedent, we conclude that the applications of STM, Green Country and Swallow were properly returned. This decision renders moot the Motions for Stay of Proceedings.

3. The questions raised by applicants and petitioners in this proceeding include the following: whether applicants have met the requirements

[1] In the cellular service, for the first time, the Commission established a one-day filing period. This single filing day was preceded by a two-week filing "window". *Cellular Communications Systems*, 89 FCC 2d 58 (1982) (Reconsideration Order), para. 64. Originally, the filing date for these markets was September 7, 1982. The Commission postponed the filing date for these markets to November 8, 1982. *See Cellular Communications Systems*, 90 FCC 2d 571 (1982) (Further Reconsideration).

of Section 1.115(b) of the Commission's rules regarding the showing necessary for the grant of an application for review, *i.e.*, the Bureau either misinterpreted and/or misapplied Commission precedent, or erroneously decided a material question of fact; and whether other factors have been presented which would justify waiver of the Commission's filing date requirement.

4. Applicants seek review on the basis that the Bureau's action "is in conflict with . . . case precedent, or established Commission policy,"[2] and is based upon "[a]n erroneous finding as to an important or material question of fact."[3] Oppositions state that applicants have failed to establish a basis for review, but we find that the required grounds have been stated. As discussed below, however, applicants have failed to substantiate their arguments, and their application for review will therefore be denied.

Policy and Precedent

5. The Applicants rely heavily on Commission precedent allowing waiver of the cut-off rule to argue that the Bureau has erred in denying waiver here. Their reliance is misplaced for several reasons. First, the Commission has frequently granted cut-off rule waivers in cases of amendments or of renewal applications, but not in cases involving initial applications for service.[4] Second, even in those cases, waivers are granted only upon showings of compelling circumstances. Third, the grant of a waiver presupposes a showing of the applicant's good faith and due diligence.

(a) Applications for New Service Distinguished from Amendments and Renewals.

6. The Commission's distinction, for the purposes of waiver of cutoff rules, between applications to initiate service, and amendments of pending

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[2] 47 C.F.R. §1.115(b)(2)(i).

[3] 47 C.F.R. §1.115(b)(2)(iv).

[4] The Commission did grant such a waiver in Caldwell Television Associates, Ltd., 53 RR 2d 1686 (1983) (*Caldwell II*). This case concerned the failure of a courier service to make one-day delivery. The delay was caused by the closing of an airport at an intermediate stop, due to severe weather conditions. This case is discussed further at paras. 7 *et seq.* The other waiver grant relied on by applicants is Bradwin Corp. v. FCC, No. 76-2050 (D.C. Cir. December 28, 1977), but reliance on this case is misplaced. Because *Bradwin* is an unreported case, it binds its own parties only. It can be referred to for *res judicata* or collateral estoppel effect, but does not serve as precedent. U.S. Ct. of App. D.C. Cir. Rule 8(f), 28 U.S.C.A. *Bradwin* concerned the applicant's erroneous belief that the FCC would be closed on November 11, Armistice Day. The case occurred at a time when the official federal celebration of the holiday had recently been changed, and many states and organizations retained the traditional holiday. Applicants documented the national confusion which produced their error, including presenting the Congressional Record, and the Court found it a "unique or compelling" circumstance.

applications, is clear and well established. *See, e.g., Caldwell Television Associates, Ltd.*, 52 RR 2d 413 (1982) (Caldwell I) which states: "In contrast, amendments to applications (made after the time for filing as a matter of right) can be made on a showing of good cause because they serve to simplify hearings by eliminating disqualifying issues or to inform the Commission of relevant information." *Id.* at n. 4.[5] This distinction was also discussed in the *Order* at para. 6. The precedents relied on by applicants here deal almost exclusively with acceptance of amendments, and, in view of this distinction and of the fact that this case concerns applications to initiate service, are thus inapposite.[6]

(b) Unique or Compelling Circumstances

7. Next, the applicants argue that, based on precedent, they have made a showing of unique or compelling circumstances which outweighs the Commission's insistence on administrative efficiency and regularity and therefore justifies waiver. The cases relied upon by applicants here discuss the required showing in language so strong as to leave no doubt that these applicants make no such showing.[7] Showings of circumstances analogous to those pleaded here have consistently been rejected as not compelling, and therefore not justifying waiver.[8] This high standard serves to emphasize that "[p]etitioner cannot avoid the consequences of its failures." *220 Television, supra* note 8, 81 FCC 2d at 577. The Commission emphasized in both *Caldwell* cases that absent "unusual and compelling circumstances" no waiver could be granted. Such circumstances must be unforeseen and unforeseeable, and must be beyond the

[5] The conclusion of this Mass Media Bureau Memorandum Opinion and Order was subsequently reversed on other grounds. *Caldwell II, supra* (finding that the facts did meet the higher threshold of "compelling circumstances" and thus justified waiver). The distinction between initial applications and amendments, and the consequent differentiation of standards, remains valid.

[6] Sources relied on by applicants here include Azalea Corp., 31 FCC 2d 561 (1971); Advanced Mobile Phone Service, Inc. (*Chicago Order*), 91 FCC 2d 512, 519 (1982); Baker-Smith Communications Co., 67 FCC 2d 548 (1978); Berwick v. FCC, 286 F. 2d 97 (1960); Redwood Television Ministries, Inc., FCC 82-482, released December 14, 1982; Bocanegra/Girald Broadcasting Group, Mimeo No. 1470, released December 22, 1982. A more lenient standard is also applied to renewal applications than to applications to initiate service, rendering another of applicants' precedents inapposite. Faith Center, Inc., 89 FCC 2d 1054, 1061 (1982), citing Carlisle Broadcasting Associates, 59 FCC 2d 885 (1976).

[7] Language requiring "a showing of the most compelling circumstances," John W. Talbot, 60 FCC 2d 511 (1976), and insistence on "unique. . .and extraordinary circumstances," The Denton Channel Two Foundation, Inc., 85 FCC 2d 983 (1981) are typical examples. *See also* note 4, *supra.*

[8] *See, e.g.*, John W. Talbot, *supra*; 220 Television, Inc., 81 FCC 2d 575 (1980); Bronco Broadcasting Company, Inc., 52 FCC 2d 836 (1982); Pacific Broadcasting Corp., 68 FCC 2d 845 (1978), including discussions, for example, of unavoidable delay at airport and alleged erroneous information from the FCC staff.

applicant's control. *Caldwell II* at para. 4. The Commission found in *Caldwell II* that "severe weather conditions in another part of the country could not have been reasonably anticipated and constitute circumstances beyond the applicant's control." *Id.* The *Caldwell II* opinion stresses the rarity of waiver, and states: "We wish to take this opportunity to reaffirm our intent to continue to enforce strictly the cut-off provisions of our rules and expect all applicants and their counsel to adhere thereto." *Id.* at para. 5. Petitioners here seek to characterize as unique and unforeseeable, and out of their control, such circumstances as the last-minute failure of a copy machine[9] and the illness of an attorney.[10] These instances are of a sort which can reasonably be anticipated, and contingency plans or actions can be put into effect to assure timely submission of applications.

8. Petitioners here seek to include, under the rubric of compelling circumstances, various public interest arguments. First, relying on *Azalea, supra* note 6, petitioners advance the argument of increasing competition and providing a wider range of choice by including for consideration "as many applicants as possible." *Azalea*, 31 FCC 2d at 562. In this instance, we do not consider this argument persuasive. As we previously indicated, *Azalea* concerned the acceptance of an amendment, not of the application itself. Permitting a timely filed applicant to amend its application in order to satisfy an outstanding disqualifying issue and thereby afford the Commission the opportunity to have a greater selection of applicants is much different than waiving our cut-off rules to accept late-filed applications. Furthermore, the dismissal of the applications in this instance, in contrast to the *Azalea* situation, will not leave the Commission with only a single applicant. Six non-wireline applicants remain in Albany-Troy-Schenectady, nine in Bridgeport-Stamford-Norwalk-Danbury, twelve in San Antonio, and eleven in Tulsa. Second, applicants seek to justify their late inclusion by reason of the public interest's being served by their minority ownership and participation.[11] This argument is rendered moot by the Commission's action of April 11, 1984 in *Florida Telephone Company* declining to grant minority preferences for cellular applicants.[12] Finally, the applicants argue that in view of the very short times involved here - in two cases, probably less than 15

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[9] Swallow Communications, Motion to Accept Late-Filed Application, submitted November 9, 1982; Green Country Mobilephone, Inc., and South Texas Mobilephone, Inc., Supplement to Petitions for Acceptance *Nunc Pro Tunc*, submitted November 19, 1982.

[10] Swallow Motion, *supra.*

[11] STM Reply to Oppositions to Application for Review, pp. 1-2; Green Country Reply to Opposition to Application for Review, p. 1.

[12] Florida Telephone Company, 84 FCC- 149, Adopted April 11, 1984. Furthermore, the issue was disposed of in *Bronco, supra* note 8, which stated on an identical argument, "[w]e do not reach such comparative questions until [the applicant] is entitled to be compared." 52 FCC 2d at 838.

minutes - the public interest is not served by a strict adherence to the rule. But in cases involving similar facts, the brevity of the period beyond cut-off was not determinative; absent compelling circumstances, we have uniformly denied waiver of the cut-off rules.[13] Strict enforcement is necessary to "orderliness, expedition and finality;"[14] "[t]here must be some point in time when the Commission can close the door to new parties. . . ."[15] The public interest considerations presented here do not constitute the compelling circumstances required for waiver of our cut-off rule.

(c) Due Diligence

9. In order to justify waiver of the cut-off rule, the applicants must demonstrate their good faith and due diligence in attempting to comply with the Commission's guidelines. The Commission said in *Caldwell I*: "A prerequisite to such waiver is that an applicant demonstrate that it has exercised due diligence. Any tardiness must be attributable to circumstances beyond the applicant's control." *Id.* at para. 3.[16] Here, applicants' due diligence has not been established. Last-minute reliance on the foolproof operation of a photocopying machine is hardly indicative of due diligence, since problems with duplicating large documents are far from unforeseeable. The illness of an attorney or short-term absence of a corporation principal, while inconvenient and regrettable, should not forestall the diligent applicant's timely submission.

10. The *Order*, at para. 8, remarked on the sufficiency of notice afforded these applicants. As stated in *Radio Athens, supra* note 15, "full and explicit notice is the heart of administrative fairness." 401 F.2d at 404. The *Order* states, "It was clearly within the power of these applicants to comply with the deadline. They had ample notice, and proper planning and foresight would have avoided their failure to comply." The applicants' last-minute race to "beat the clock," after a preparation period of several months, belies their exercise of due diligence.

Mistake of Fact

11. Applicants STM and Green Country state that the Bureau erred in concluding that their applications were in fact submitted after the 5:30 p.m. deadline on November 8, 1982. They offer no affirmative evidence that the applications were actually submitted before 5:30, but only attack the sufficiency of the Bureau's determination. Because Section 1.115 requires that applicants for review bear the burden of proof to establish

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[13] Pacific Broadcasting Corp., 68 FCC 2d 845 (1978), involved a 22-minute delay due to congestion at National Airport.

[14] John W. Talbot, *supra*, at 512.

[15] Radio Athens, Inc. (WATH) v. FCC, 401 F. 2d 398, 400-401 (1968).

[16] Citing Wright County Broadcasting Co., 13 RR2d 1251 (1968), and Pictronics, Inc., 32 FCC 2d 325 (1971).

the Bureau's error, this unsubstantiated argument is ineffectual. Further, the evidence applicants *have* submitted[17] weighs very heavily against their assertion of timeliness; the possibility of Mr. Fields' leaving his office at 5:28 p.m. and arriving at the office of the Secretary, as required by the rules[18] (not, as is apparently assumed by applicants, at the FCC's front door) by 5:30 p.m. is negligible. Third, the applicants' assumption that the reliability of the FCC lobby clock is a material issue here is unsupported, and their arguments against its accuracy are therefore irrelevant, as well as less than compelling. Applicants' insistence that being "turned away" by a guard "not even an FCC employee" is somehow less final than being foreclosed by the locked door of the Secretary's office, or by the Secretary himself, is without basis.[19] Thus applicants have established no reason to doubt the accuracy of the Bureau's factual findings.

12. As the Bureau discussed in the *Order* at para. 8, throughout the cellular application period, great emphasis has been placed on expedited initiation of service to the public; repeated notice of this policy has been given.[20] Orders designating applications for hearing have consistently noted the Commission's desire to encourage the earliest possible inauguration of the new service. This policy is best served by a reasoned adherence by applicants and by the Commission to guidelines and requirements, not by the unrestrained granting of waivers and stretching of rules. The applicants here rely on the *Chicago Order, supra* note 6, language of lenience toward applicants, based on the newness of the services proposed. But that language, 91 FCC 2d at 519, is clearly directed at the amendment of pending applications, not at the acceptance of submitted applications. Further, the *Chicago Order* states specifically that this policy applies to top-30 market applicants only, and that "[i]n markets for which applications have not yet been filed, strict conformance with the rules will be required . . . ." *Id.* [21] If the Commission wants an efficient process, it must insist that applicants adhere to its stated filing requirements.

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[17] STM Application for Review, pp. 2-6; Green Country Application for Review, pp. 2-6. *See also*, Statement of Mark E. Fields, attached to the Supplement to Petitions for Acceptance *Nunc Pro Tunc.*

[18] 47 C.F.R. §1.4(c).

[19] In fact the Secretary, Mr. Tricarico, has indicated that he, together with the Managing Director, Mr. Minkel, went to the lobby guards at 5:30 p.m. and instructed them not to admit any more bearers of applications.

[20] Cellular Communications Systems, 86 FCC 2d 469, 498-99 (1981), *modified*, 89 FCC 2d 58, 85-88 (1982), *further modified*, 90 FCC 2d 571, 573-74 (1982).

[21] The *Chicago Order* was released one week before the filing date for the applicants presently before the Commission.

Conclusion

13. Case precedent clearly supports the dismissal of these applications. "[The cut-off] rules serve important public purposes, including fairness among applicants and expedition in the dispatch of the Commission's business."[22] Strict enforcement of the cut-off rules is necessary to administrative efficiency. Furthermore, those cases which are factually most similar to the instant applications have uniformly been dismissed. Applicants STM and Green Country argue that their filings were at most a few minutes late. That may be, but "[t]here must be some point in time when the Commission can close the door to new parties. . . ."[23] The applicable rules and orders established 5:30 p.m., November 8, 1982 as the cut-off time, and all applicants were expected and required to abide by the ruling. "If we were accept [applicants'] argument, we would have no basis for determining when a competing application has been filed 'too late.' "[24] Acceptance of petitioners' argument would foreclose the strict enforcement of our cut-off rules because that argument would be available in almost every instance where the Commission is presented with a late-filed application. This would mean that the Commission would consistently have to expend resources on case-by-case waiver requests and never be certain that the processing of a defined group of applicants could begin without disruption. Such potential disruption does not further the public interest. *See, e.g., Direct Satellite Broadcast Systems,* 88 FCC 2d 100, 110 (1981), *recon. denied,* 89 FCC 2d 177 (1982).

14. The goals of administrative efficiency and regularity, and of fairness, mandate denial of these applications for review. The Commission's frequently stated desire for expedited processing of cellular service applications confirms that mandate.

15. Accordingly, IT IS ORDERED, that the Applications for Review of Green Country Mobilephone, Inc., South Texas Mobilephone, Inc., and Swallow Communications ARE DENIED.

16. IT IS FURTHER ORDERED that the Motions for Stay of Proceedings of South Texas Mobilephone, Inc., and Green Country Mobilephone, Inc., ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[22] *Bradwin, supra* note 4.

[23] *Radio Athens, supra,* 401 F.2d at 400-401.

[24] *Bronco, supra* note 8, 52 FCC 2d at 837.

Amicus Curiae
Female Ownership-Participation, Comparative Credit for
Intervention, Request for Denied
Minority Ownership, Factor in Comparative Proceedings Ownership, Minority, Comparative Preference for

Application for review granted to an extent and denied in other respects. One hundred percent female applicant preferred over 15% black owned applicant where both applicants were fully integrated. Review Board Decision modified to indicate that Commission will give comparative credit for less than controlling integrated minority ownership. Late filed intervention request denied but trade association formed to represent Black broadcasters permitted to participate as an *amicus curiae*.
—*Horne Industries, Inc.*
BC Docket No. 81-551

FCC 84-286

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Horne Industries, Inc. Russellville, Arkansas	BC Docket No. 81-551 File No. BPH-11185
River Valley Broadcasting, Inc. Russellville, Arkansas	BC Docket No. 81-552 File No. BPH-800711AJ
Judy K. Purtle Russellville, Arkansas	BC Docket No. 81-553 File No. BPH-800807AE
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1984; Released: July 20, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

1. Three competing applications for a new FM station in Russellville, Arkansas were filed. In a Decision, FCC 83R-49, 94 FCC 2d 815, released July 13, 1983, the Review Board affirmed the Initial Decision, granted the application filed by Judy K. Purtle, and denied the competing applications filed by Horne Industries, Inc. and by River Valley Broadcasting, Inc. On August 12, 1983 River Valley filed an Application for Review of the Review Board Decision.[1] In addition, the National Association of Black Owned Broadcasters (NABOB) filed a "Motion to Intervene and Application for Review" on August 12, 1983.[2]

2. NABOB is a trade association which was formed in 1977 to represent the interests and concerns of Black broadcasters. Its membership includes the licensees of more than 137 radio and television broadcast stations, and a substantial number of companies and individuals who are involved in various media related activities. NABOB asserts that the Review Board's Decision may adversely affect the interests of NABOB and its members. Specifically, NABOB submits that the Board's conclusion that less than controlling minority ownership of interests should be accorded no significant comparative qualitative enhancement may reduce the number of new stations awarded to NABOB's current and prospective members. Accordingly, NABOB claims that it has an interest in this proceeding and requests that it be permitted to intervene.

3. NABOB has not established a basis for intervention pursuant to Section 1.223(c) of our Rules. Nevertheless, in view of the importance of the issues raised in this proceeding, we will allow NABOB to participate as an *amicus curiae* and accept its pleading. *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262 & n.3 (1982); *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1019 (1981). NABOB's participation in this manner will enable us to consider its view on an important question of general applicability to comparative proceedings and will not cause any delay or otherwise prejudice the parties to this proceeding.

4. Having examined the contentions of the parties and NABOB, we conclude that Judy K. Purtle is the comparatively superior applicant and that the grant of a construction permit to Purtle is fully justified. As the

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[1] Judy K. Purtle filed an Opposition to the Application for Review on August 29, 1983, and River Valley filed a Reply on September 8, 1983, which exceeds the five page limitation set forth in Section 1.115(f) of our Rules. Purtle filed a Motion to Strike the River Valley Reply on September 14, 1983 which alleges that the Reply is not authorized by the Commission's Rules. Under Section 1.115(f) of our Rules replies are permitted only if requested by the Commission. Since we did not request that replies be filed, we will grant Purtle's Motion to Strike.

[2] Judy K. Purtle filed an Opposition to the Motion to Intervene on August 23, 1983.

Commission indicated in its Order remanding this case to the Board,[3] our commitment to encouraging greater participation in broadcasting by women is well established. As the Board correctly recognized, under Commission precedent[4] minority ownership and participation has more significance as an enhancement factor than female ownership and participation. However, in this case the disparity between River Valley's 15 percent minority participation and Purtle's 100 percent female participation is too large to permit River Valley's enhancement for minority ownership to equal or exceed River Valley's enhancement for female ownership. Thus, Purtle's enhancement credits for 100% female ownership, civic involvement, and broadcast experience outweigh River Valley's slight preference for proposing auxiliary power and its enhancement credits for 15% minority ownership and civic involvement,[5] even if no comparative demerit is assessed against River Valley for the misstatements of its 15% owner. Accordingly, we will deny review and adopt the findings of the Review Board. However, we believe that comment on one aspect of the Board's Decision is warranted.

5. The Board indicated that a less than controlling minority interest might be decisionally significant in tied cases but that in other cases the "threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at a more-than-50% (or otherwise controlling) interest level . . . ."[6] To the extent that this suggests that less than controlling minority interests will have no comparative significance except as a tie breaker in an otherwise dead-

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[3] FCC 83-208, released May 3, 1983. The Commission recently denied review in two cases where enhancement credit for female ownership proved to be decisive. *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983), *review denied*, FCC 84-161, adopted April 11, 1984; *North Carolina Radio Service, Inc.*, 92 FCC 2d 621 (Rev. Bd. 1982), *review denied*, FCC 83-211, adopted April 27, 1983.

[4] *Mid Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978); *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2147 n.26 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423 (1981); and *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829 (Rev. Bd. 1979), *review denied*, FCC 80-734, released December 4, 1980, *aff'd per curiam without opinion*, D.C. Cir. No. 81-1028, October 19, 1981. *See also Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591, 1593 n.9 (1978).

[5] Although it appears that the ALJ and the Review Board did not give River Valley any enhancement credit for civic involvement, this does not adequately reflect the ALJ's findings of fact with respect to the civic involvement of Jerry Canerday. Thus, we will give some credit to River Valley for civic involvement. However, the record does not support River Valley's contention that the combined civic involvement of Jerry Canerday and Almer Jackson is superior to that of Judy Purtle. *See* Initial Decision, 91 FCC 2d 1198, 1201-04. Since River Valley and Purtle are entitled to essentially equal credit for civic involvement and since Purtle is preferred on the other factors pertinent to this case for the reasons stated above, the credit awarded herein to River Valley for civic involvement does not affect the outcome of this case.

[6] *Horne Industries, Inc.*, 94 FCC 2d 815, 827 (Rev. Bd. 1983).

locked proceeding we must disagree. The Board relies on the fact that minority control is generally a prerequisite for qualifying for distress sale relief,[7] a tax certificate[8] a lottery preference[9] or preferential treatment in filing for a clear channel.[10] However, we have never extended this control requirement to the comparative licensing proceeding and we decline to do so at this time. The situations cited by the Board raise different considerations from those involved in a comparative licensing proceeding.[11] Our only criterion for granting a tax certificate, distress sale relief or a lottery preference is the degree of minority ownership represented. In those instances, we have chosen to afford preferential treatment where control by minority group members assures that minority involvement will be significant. However, we give no credit in a comparative proceeding for minority ownership *per se.* Rather, qualitative enhancement credit is awarded for minority ownership and participation under the integration criterion.[12]

6. Under *TV 9, Inc.* v. *FCC,* 495 F.2d 929 (D.C. Cir. 1973), *cert. denied,* 418 U.S. 986 (1974), we must give merit in a comparative proceeding

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[7] *Grayson Enterprises, Inc.,* 77 FCC 2d 156, 165 (1980). *See also Patrick Henry,* 79 FCC 2d 393 (1970), where we held that negative control (50%) is necessary to qualify for distress sale relief.

[8] *Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979 (1978) *clarified* 44 RR 2d 479 n.20 (1979). In the rather unique situation presented by a limited partnership, a seller is eligible for either a distress sale or a tax certificate provided the general partner(s) is a minority with complete managerial control over the station and has at least a 20% interest. *Minority Ownership in Broadcasting,* FCC 82-523, 52 RR 2d 1301, 1306, released December 13, 1982.

[9] *Competing Applicants Using Random Selection,* 93 FCC 2d 952 (1983), Section 1.1622(b)(1).

[10] *See Clear Channel AM Broadcasting,* 78 FCC 2d 1345, *recon. granted in part and denied in part,* 83 FCC 2d 216 (1980).

[11] To the extent that the Board also relied upon *Waters Broadcasting Corp.,* 91 FCC 2d 1260 (1982), that reliance is misplaced. There the losing applicant received enhancement credit for 24% female ownership and participation.

[12] The Commission has previously determined that minority ownership should be considered under the factor of integration of ownership and management. *See WPIX, Inc.,* 68 FCC 2d 381, 411-12 (1978). *See also Absolutely Great Radio, Inc.,* FCC 83-464, 55 RR 2d 15, released October 13, 1983; *HLDM Communications,* 93 FCC 2d 143, 145 (Rev. Bd. 1983); *Las Missiones de Bejar Television Co.,* 93 FCC 2d 191, 194-95 (Rev. Bd. 1983), *review denied,* FCC 84-97, released May 16, 1984. Since credit for minority ownership is awarded only to the extent that the minority owner(s) will be involved in station affairs, the Board's reliance on *HLD&M Communications* and *Las Misiones de Bejar Television Co.* to support the adoption of a control requirement in comparative proceedings is misplaced. In both cases the minority applicant proposed significantly less than 100% integration. In this regard it is well established that qualitative attributes, such as minority ownership, may enhance the value of an integration proposal but cannot overcome clear quantitative differences. *Alexander S. Klein, Jr.,* 86 FCC 2d 423, 428-29 (1981); *Van Buren Community Service Broadcasting, Inc.,* 87 FCC 2d 1018, 1022 (Rev. Bd. 1981).

"when minority ownership is likely to increase diversity of content, especially opinion and viewpoint."[13] Since we require that minority owners be actively involved in station affairs in order to qualify for any enhancement credit for minority ownership, we disagree with the Review Board that a controlling interest is necessary to ensure the likelihood of increased diversity of content and that enhancement credit for a less than controlling minority interest should have no significance except as a tie breaker in an otherwise deadlocked comparative proceeding.[14] We believe that minority owners with less than a controlling interest may nevertheless have an important voice in station's affairs, and that adopting a control requirement for significant enhancement credit may result in less involvement in broadcast ownership by minority group members who lack the capital to acquire a controlling interest in a broadcast applicant. Accordingly, we will continue to consider participating minority ownership which is less than controlling to the degree of minority ownership and participation represented.[15] The credit will be weighed along with all other factors relevant in determining which applicant will better serve the public interest.

7. ACCORDINGLY, IT IS ORDERED, That the Motion to Intervene and Application for Review, filed August 12, 1983, by National Association of Black Owned Broadcasters IS DENIED, but that National Association of Black Owned Broadcasters IS GRANTED leave to participate in this proceeding as an *amicus curiae* and that its Application for Review IS ACCEPTED as an *amicus* brief.

8. IT IS FURTHER ORDERED, That the Motion to Strike the River Valley Reply, filed September 14, 1983, by Judy K. Purtle IS GRANTED

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[13] 495 F.2d 929, 938 (D.C. Cir. 1973).

[14] In *TV 9, Inc.* v. *FCC* the court did not specify the strength of the merit due for minority ownership and participation. However, the court did fault us for not giving any credit to an applicant with two Black 7% stockholders who would participate in station affairs. 495 F.2d 929, 941. In doing so the court found that minority ownership and participation was a relevant factor under the criterion of integration of ownership and management in determining which applicant will be more responsive to the needs of the local community. 495 F.2d 929, 937, n.26. Thus, under *TV 9, Inc.* v. *FCC*, less than controlling interests are clearly entitled to some comparative significance.

[15] *Absolutely Great Radio, Inc.*, FCC 83-464, 55 RR 2d 15, 22, released October 13, 1983 (applicant with 15.5% minority ownership in significant managerial position and 49% female ownership preferred over applicant with 15% minority ownership in less significant managerial position and slight preference for broadcast experience); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 819 (Rev. Bd. 1982) *review denied*, FCC 83-368, released September 15, 1983, *appeal pending*, D.C. Cir. Nos. 83-2067, 83-2071, 83-2072 (applicant entitled to merit 14.29% minority ownership and 7.15% female ownership but this merit outweighed by substantial enhancement credit for local residence, civic participation, and broadcast experience); *Alexander S. Klein, Jr.*, merit); and *WPIX, Inc.*, 68 FCC 2d 381, 412 (1978) (applicant with 5.7% minority ownership entitled to enhancement credit).

and the Reply to the Opposition, filed September 8, 1983, by River Valley Broadcasting, Inc. IS DISMISSED.

9. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review, filed August 12, 1983, by River Valley Broadcasting, Inc. IS GRANTED to the extent reflected herein and IS DENIED in all other respects, and that the Review Board's Decision, 94 FCC 2d 815, released July 13, 1983, IS MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Memorandum Opinion and Order in Russellville, Arkansas Comparative FM Proceeding.

The Commission has wisely rejected the Review Board's determination that credit for minority and female ownership in comparative cases should be given only when those individuals hold a controlling interest in a broadcast applicant. The public interest in mass media diversification is furthered by policies that encourage underrepresented groups to obtain a stake in the industry, and even non-controlling ownership interests advance this objective.

I am only disappointed about the Commission's continued uncritical acceptance of the notion that comparative credit for minority (and, presumably, female) ownership should be limited to instances in which such owners will participate in station management.[1] As we have previously recognized, participation by minorities an industry's ownership structure is "essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment."[2] That being so, applications reflecting significant minority or female ownership should receive comparative enhancement irrespective of whether owners will participate in management, in recognition of their contribution to these fundamental

[1] *See Memorandum Opinion and Order* at paras. 5-6.

[2] Waters Broadcasting Corp., 91 FCC 2d 1260, 1264-66 (1982) (noting congressional and judicial endorsement of this policy objective), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, No. 82-2513 (D.C. Cir. May 25, 1984).

goals.[3] Fortunately, the foregoing defect in FCC comparative policy did not prejudice either applicant in this case because minority and female owners were fully integrated into management and, thus, fully credited.

[3] I have previously urged the Commission to revise the manner in which minority ownership is evaluated in comparative cases. *See Absolutely Great Radio, Inc.*, 55 RR 2d 15 (1983), *reconsideration denied* FCC 84-120, released May 16, 1984 (Dissenting Statement of Commissioner Henry M. Rivera); *Las Misiones de Bejar Television Co., order denying review*, FCC 84-97, released May 16, 1984 (Dissenting Statement of Commissioner Henry M. Rivera).

Comparative Hearing
Past Performance, Record of
Renewal, Applicant v. New Applicant

Review Board reversed *I.D.* and granted renewal application of Station KSOL(FM). No disqualification or demerit assessed for unrelated misconduct of parent United Broadcasting Corp. at distant stations WOOK(AM) and WFAB(FM). Licensee's past performance in most recent (pre-challenge) term was at least "substantial," previous terms were "more than minimal."
—*Intercontinental Radio, Inc.*
BC Docket No. 81-890

FCC 84R-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Intercontinental Radio, Inc.	
For Renewal of License of Station KSOL(FM), San Mateo, California	BC Docket No. 81-890 File No. BRH-800801WG
Afro-American Communications San Mateo, California	BC Docket No. 81-891 File No. BPH-801103AL
San Mateo Broadcasting Company, Inc. San Mateo, California	BC Docket No. 81-892 File No. BPH-801027AI
For Construction Permit	

Appearances

David Tillotson, Thomas Schattenfield, and *Robert S. Koppel,* on behalf of Intercontinental Radio, Inc.; *Lawrence J. Bernard, Jr.,* on behalf of Afro-American Communications; *Lewis J. Cohen* and *Roy W. Boyce,* on behalf of San Mateo Broadcasting Company, Inc.; and *Stephen*

Yelverton and *Charles E. Dziedzic,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: July 17, 1984; Released: July 27, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL. BOARD CHAIRMAN MARINO ISSUING A SEPARATE STATEMENT.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually-exclusive applications of Intercontinental Radio, Inc. ("IRI") for renewal of license of Station KSOL-FM, San Mateo, California; and Afro-American Communications ("Afro") and San Mateo Broadcasting Company, Inc. ("SMBC") for authority to construct a new FM broadcast station (Channel 299) at San Mateo, California. By *Memorandum Opinion and Order*, 46 Fed. Reg. 62930, published December 29, 1981, these applications were designated for consolidated comparative hearing to determine on a comparative basis which proposal would best serve the public interest. In an *Initial Decision* ("*I.D.*"), FCC 83D-70, released December 28, 1983, presiding Administrative Law Judge Frederic J. Coufal (ALJ) granted the Afro application after concluding that KSOL-FM's broadcast record during 1968-80 did not merit a "renewal expectancy," that KSOL-FM was comparatively inferior under both the diversification and integration of ownership factors, and that Afro was the best applicant because its superiority for enhanced full-time integration outweighed SMBC's advantages for enhanced part-time integration and proposed auxiliary power.

2. We have reviewed the *I.D.* in light of the exceptions, the reply briefs, the oral argument held May 10, 1984, and our independent examination of the record. The Board adopts the findings of fact and conclusions of law in the *I.D.*, except as modified herein. However, because we agree with certain of IRI's exceptions and find that IRI is entitled to a "renewal expectancy," we reverse the ALJ's ultimate conclusion and grant the KSOL-FM renewal application.

IRI's Qualifications

3. *Basic.* A fundamental matter for preliminary disposition is whether IRI is basically qualified to retain its license. In designating this case for consolidated comparative hearing,[1] the Commission expressly discussed

[1] *See Memorandum Opinion and Order*, FCC 81-571, released December 21, 1981 ("*Designation Order*").

this very question. It noted that IRI "is a wholly-owned subsidiary of Tele-Broadcasters, Inc. which in turn is more than 90% owned by United Broadcasting Co. (United)."[2] It specifically referenced United's checkered broadcast history and observed that "[o]ver the past several years, the Commission has denied or revoked four of United's licenses."[3] Until his recent death, Richard Eaton was the sole owner of United.[4] Despite United's regulatory loss of several broadcast licenses, the *Designation Order* declares that — except for the questions remaining as to the late Richard Eaton's personal role in United's prior broadcast misconduct — "a review of Intercontinental's license renewal application indicates that . . . it also is qualified to be a Commission licensee."[5] The Commission then determined that inasmuch as the pertinent questions relating to Richard Eaton's personal role were being explored concurrently in another comparative renewal hearing involving United's WOOK-FM,[6] "[a] final determination as to KSOL(FM)'s [IRI's] qualifications will therefore be conditioned on the outcome of the WOOK(FM) proceeding."[7]

4. Pursuant to the Commission's directive, the ALJ presiding in the WOOK-FM case (the same ALJ as presided here, *see supra* note 7) thoroughly explored the role of Richard Eaton and the possible impact of that role on United's basic qualifications. *United Broadcasting Co., Inc.*, 94 FCC 2d 960, 992-994 (1982) (ALJ). He ultimately concluded that no reliable evidence tied Richard Eaton *personally* to the various misconduct at several other United stations, *id*, at 994 (para. 110); and, after examining United's current management structure and "a virtually unblemished record at WOOK(FM) for ten years," *id.*, at 993, he found

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[2] *Id.*, at para. 12.

[3] *Id.*, at para. 13 & n.13. *See United Television Co.*, 46 FCC 2d 698 (1974); *United Television of New Hampshire*, 46 FCC 2d 702 (1974), *aff'd*, 514 F.2d 279 (D.C. Cir. 1975); *United Broadcasting of Florida*, 55 FCC 2d 832 (1975), *recon. denied*, 60 FCC 2d 816 (1976) ("WFAB"); *United Television Co.*, 55 FCC 2d 416 (1975), *recon. denied*, 59 FCC 2d 663 (1976), *aff'd sub nom. United Broadcasting Co.* v. *FCC*, 569 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978) ("WOOK-(AM)").

[4] *Id.*, at para. 12. Richard Eaton's death on June 1, 1981 did not moot all of the questions relating to United's qualifications. *See Friendly Broadcasting Co.*, 90 FCC 2d 225 (1982), where the death of Richard Eaton did help induce the Commission to permit the sale of two of United's Cleveland, Ohio stations. However, the Cleveland sale was "subject to such action as may be deemed appropriate in light of the ultimate findings in the *WOOK(FM)* proceeding." *Id.*, at 228. The WOOK-FM proceeding, having been decided by the ALJ and the Board, is currently before the Commission for review, *see infra* para. 4.

[5] *Designation Order* at para. 11.

[6] *See United Broadcasting Co.*, 86 FCC 2d 452 (1981).

[7] *Designation Order*, at para. 14. In the interests of administrative efficiency and consistency, the Commission instructed that the ALJ presiding over the WOOK-FM hearing also be assigned the instant case. *Id.*, at para. 15. This was done.

United not to be basically unqualified.[8] Upon exception to the WOOK-FM initial decision, above, this Board reexplored the record revelations on "whether Richard Eaton was personally responsible for United's misconduct."[9] As did the ALJ, the Board found that although Richard Eaton had plenary responsibility as the president and sole stockholder of United, there was virtually no probative evidence to indicate that Richard Eaton was personally involved in, or solely at blame for, the various misconduct at several United stations.[10] *United Broadcasting Co., Inc.*, 94 FCC 2d 938, 941-947 (1983) (Rev. Bd.) (application for Comm'n review pending). Conversely, the Board did find that several current and key WOOK-FM executives had immediate management responsibility over the illicit operational activities causing the loss of the WOOK-AM license, *see id.*, at 946-947, and for that reason we assessed United a substantial comparative demerit in connection with the renewal of WOOK-FM. *See id.*, at 947, 959.[11] Having affirmed the ALJ's conclusion that United was not basically disqualified with respect to the renewal of WOOK-FM — despite the residual ties to the corrupt WOOK-AM operation — we, *a fortiori*, cannot now find that IRI is basically unqualified for a renewal of KSOL-FM. We obviously affirm the instant *I.D.* in that respect.[12]

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[8] *Id.*, at 994. He did, however, find that the wrongdoing that led to the loss of WOOK-AM, *see United Broadcasting Co.* v. *FCC*, *supra* note 3, did have some impact on United's "comparative" qualifications in the competitive contest for WOOK-FM. *See* 94 FCC 2d at 994-995.

[9] *See Designation Order* at para. 13.

[10] The findings of both the ALJ and the Board that the WOOK-FM record did not by substantial evidence support the proposition that Richard Eaton was solely and personally responsible for the WOOK-AM misconduct were made, *mirabile dictu*, in the face of ardent insistence by United *to the contrary. See, e.g., United Broadcasting, supra*, 94 FCC 2d at 946-947; *id.*, at 993-994. Postulating that the death of Richard Eaton purged United of all past misconduct, United argued that no basic or comparative stigma affected the WOOK-FM renewal. *See id.*

[11] It bears explaining that the most serious United misconduct occurred at WOOK-AM, a black-formated station found, *inter alia*, to have been broadcasting tips for the underworld "numbers game" and disseminating false advertising. *See United Television Co., Inc., supra* note 3. WOOK-FM, at the time of the misconduct at WOOK-AM, was known as WFAN-FM, a Spanish-language formated United station. On December 24, 1976, or shortly after the denial of WOOK-AM's renewal, the AM and the FM swapped substantive identities. *See United Broadcasting, supra*, 94 FCC 2d at 940 n.3. Thus, the fatally discredited WOOK-AM — including format and key management — became WOOK-FM, the "station" set for comparative renewal hearing in 1981 (at 81 FCC 2d 227). The Spanish-language operation (nee WFAN-FM) evaporated with United's terminal loss of WOOK-AM.

[12] SMBC did not seek — pursuant to the *Designation Order's* written invitation — to enlarge the issues in this case to explore the impact of the "basic qualification" findings of the WOOK-FM case. Nor has it formally excepted to the ALJ's findings herein that IRI is basically qualified; it merely "reserves the right to raise this question if warranted in light of the Commission's final resolution of the WOOK(FM) case." SMBC Exceptions

5. *Comparative.* Having expounded much of the background engendering the imposition of a substantial comparative demerit against United in the context of the recent WOOK-FM renewal proceeding, we must now — per the *Designation Order* — consider whether the findings in the WOOK-FM case relative to Richard Eaton have any bearing on the "comparative" qualifications of IRI in the San Mateo licensing proceeding at bar. In the *Designation Order* (at para. 14), the Commission enjoined the parties herein to petition the ALJ to add any issues that might wax material in light of the revelations or the outcome of the WOOK-FM case. In view of his own conclusions in that prior case (*see* 94 FCC 2d at 994), and the Board's subsequent affirmation thereof (*see* 94 FCC 2d at 946-947), the ALJ here declined (properly, we think) to add any issues against IRI based on evidence surfacing in the WOOK-FM proceeding. *I.D.* at 2 n.2 (*citing Memorandum Opinion and Order*, FCC 83M-4044, released November 4, 1983 (ALJ)). Somewhat surprisingly, however, it was IRI that accepted the Commission's explicit *Designation Order* invitation to here add issues arising from the work product of the WOOK-FM proceeding, not SMBC or Afro. *I.D.*, para. 58. More surprisingly, and despite his unqualified refusal to add any issue to determine the specific effect of the findings of the WOOK-FM proceeding on IRI's qualifications, the ALJ nonetheless factored into the KSOL-FM initial decision the records of United's WOOK-AM (and WFAB) and weighed these records adversely against IRI. *Id.* (& para. 59).[13] In so doing, he expressly rejected IRI's dialectic that, before the record of IRI's operation of KSOL should be burdened with the violations of other United-owned stations, some " 'nexus' between the wrongdoers at those stations and those responsible for KSOL must exist. . . ." *See id.*

6. In our aforecited WOOK-FM decision, we acknowledged the court's reminder in *RKO General* that "individual stations have different broadcast histories and policies,"[14] and we were keenly attentive to the Commission's exposition in *Faulkner Radio* expressing its view that a corporate multi-station owner found to have engaged in serious misconduct at one station (or even more than one) should lose all of its licenses only if the record discloses a "pervasive unwillingness or inability to meet

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at 2 n.1. *But cf.* SMBC Reply at 8 *et seq.* Because SMBC has neither excepted to the ALJ's findings that IRI is basically qualified nor supported such hypothetical exceptions by citations to the record evincing error by the ALJ, its "reservation" of right to challenge IRI's basic qualifications may be considered cancelled. 47 CFR §1.277(a).

Afro counsel conceded the "basic" qualifications of IRI. *See* Tr. of Oral Arg. (May 10, 1984) at 2833-2834.

[13] *See also I.D.*, paras. 30-32.

[14] *See* 94 FCC 2d at 944, *citing RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981).

the basic responsibilities of a licensee."[15] *See* 94 FCC 2d at 944. As indicated above, neither the ALJ nor the Board found persuasive evidence that Richard Eaton or any current United official (other than those WOOK-AM/FM managers specifically discussed) was personally chargeable for the culpable misdeeds at the several United stations and that, mindful of the *Faulkner Radio* policy exposition restated in the margin (*see supra* note 15), United was not basically disqualified with respect to all of its other stations. Again, though, because of the unique history of WOOK-FM, we assessed a substantial comparative demerit against United in that particular case. That is, it will be recalled, after 1976, the substantive operation that inhabited the WOOK-FM frequency, *corpore et animo*, was WOOK-AM, the license for which was lost for very serious misconduct. We observed that both the WOOK-AM general manager and the operations manager who had guided the station at the time of the serious transgressions yet retained high management positions at the reconstituted WOOK-FM, *see* 94 FCC 2d at 946-947, and we contrasted that situation with *Faulkner Radio* where it was shown that no party having immediate responsibility over the actionable conduct remained with that licensee. *See id.*, at 947.[16] In view of the continuing and palpable nexus between the discredited WOOK-AM operation and the current WOOK-FM, we could not earnestly make an unqualified prediction of future regulatory compliance, and a comparative demerit was therefore assessed.

7. No such "palpable nexus" has been shown between KSOL and WOOK-AM (or WFAB); all that is shown here is common corporate ownership under the late Richard Eaton. There has been no finding that Richard Eaton was solely or personally responsible for the problems at the several other United stations, *see, e.g.*, 94 FCC 2d at 946,[17] and it is

[15] *Faulkner Radio, Inc.*, 88 FCC 2d 612, 616 (1981). Therein, the Commission's survey framework of the prior misconduct of corporate multi-station owners devolved into a tripartite analysis: "(1) the nature of the misconduct involved, (2) the attribution of personal responsibility . . ., and (3) the likely deterrent effect of losing [the station with respect to which the misconduct occurred]." *Id.*

[16] Indeed, the Commission's action in *Faulkner Radio* may have been more stringent than ours in WOOK-FM. There, the Commission flatly conditioned the basic renewal of *all* of Faulkner's licenses "on the total exclusion of [the culpable official] from the operation of Faulkner Radio, Inc. or any of its stations." 88 FCC 2d at 618.

[17] In fact, Afro counsel specifically declined to urge a comparate demerit against IRI based on the posthumous persona of Richard Eaton:

> [Board question]: There's never been a finding in any Commission case involving the United stations that either of the members of the Eaton family involved were personally responsible for the transgressions, has there been?
>
> [Afro counsel]: No. Quite the contrary, until we got to these cases, and Mr. Eaton died. Then they came in and told us that he

here agreed that the broadcast record of KSOL-FM — from 1968 to date — is absolutely free of violations of any FCC rules or policies. It appears, then, that the court's observation in *RKO General* that, even under the same corporate parent, "individual stations have different broadcast histories and policies" is borne out visibly in the case of KSOL-FM. But even prior to the court's *RKO General* decision (affirming the loss of WNAC-TV, Boston), the Commission itself contemplated RKO's other broadcast stations and stated[18]:

> We recognize that our basic goal is to assure quality *prospective* broadcast service for the public *and not to 'punish'* [the licensee] *for any misdeeds it or its parent corporation has committed.*

However, and unlike the unique circumstances of the WOOK-FM case where the egregious record of WOOK-AM seemed to us quite pertinent as a valid predictive factor, the ALJ's analysis in the instant case does not explain why the history of WOOK-AM (or WFAB) is authentically predictive of IRI's ability to assure that no similarly violative conduct "occurs" at KSOL-FM. Nor did the ALJ conceptually employ anything in the nature of the tripartite inquiry suggested by the Commission in *Faulkner Radio, see supra* note 15. To be frank, nothing in the *I.D.* relying on the violations at WOOK-FM (or WFAB) explains "the significance of [those] facts particularly relied on" or "articulat[es] with . . . clarity" the precise basis for IRI's comparative penalty. *See generally Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37, 49 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). Further, the ALJ's sole basis for downgrading IRI's operational level of KSOL-FM on a comparative basis — common United corporate ownership — is manifestly inconsistent with the teachings of *RKO General* and *Faulkner Radio*, and even the Board's rationale and its decision in WOOK-FM where the downgrading

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was personally responsible for everything, now he was gone, and they'd be good in the future.

[Board question]: I thought we took care of that in WOOK-FM?

[Afro counsel]: You did, very effectively . . . .

Tr. of Oral Arg. at 2850-2851.

In its Reply (at 9; emphasis added), SMBC contends that a "comparative demerit . . . would have been clearly warranted *had Eaton been alive. . . .*" So much for "*de mortuis nil nisi bonum.*" It also pointed to the continuing involvement of Richard Eaton's son, Pierre, and Gerald Hroblak in the United organization, *id.*, as well as the continued employment of the two WOOK-FM management officials discussed by the Board in that case. *Id.* In sum, SMBC urges that "United — they fall." We disagree. *Faulkner Radio, supra*; *Friendly Broadcasting, supra.* Apart from the two WOOK-FM managers discussed, no current United official has been tied personally to past deficiencies. *See I.D.*, para. 5.

[18] *RKO General, Inc.*, 82 FCC 2d 291, 295 (1980) (emphasis added).

of United was not "automatic" but fused to the direct, connective link between the past management at WOOK-AM and the WOOK-FM renewal application. Indeed, nothing so conclusively demonstrates the fallacy of the ALJ's "predictive" assumptions with respect to IRI's *prospective* ability to keep KSOL-FM compliant with FCC rules and policies as the fourteen-year, violation-free record of that station minutely assayed by him in this very proceeding. Why the *empirical* is subordinated to the *a priori* in forming a predictive judgment about IRI's future stewardship of KSOL-FM is not rationally explained in the *I.D.*, nor can the Board conjure such.[19] The particular misconduct at WOOK-AM and WFAB is so remote in time (and distance) that, even without the wholly unblemished KSOL-FM record, no really reliable predictive inferences as to IRI would now be warranted. *Cf. Donald W. Reynolds*, 65 FCC 2d 451 (1977) (no significant question raised as to future reliability of licensee who had lost one station for fraudulent billing and misrepresentation). Since the *I.D.'s* comparative downgrading of IRI cannot be said to be based on very meaningful or reliable auspices, it is naught but punitive, and therefore antithetical to stated Commission doctrine. *RKO General, Inc.*, *supra* note 18. And, finally, even were we to find *some* predictive value in the records of WOOK-AM or WFAB (and completely ignore the more relevant record of KSOL-FM), any residual demerit assigned IRI (according — we suppose — to the ancient prescripts of "corruption of blood"[20]) could be no more than very slight and effectively nondecisional in the context of this larger San Mateo case. It is the tangible record that IRI has compiled at KSOL-FM which is the true fulcrum here, and it is to that record we now turn our attention.

IRI's Record at KSOL-FM

8. *Relevant Period of Review.* KSOL's broadcast record has not been reviewed by the Commission or formally renewed since 1968[21]; its renewal applications for 1971, 1974 and 1977 have been deferred pending the close examination of United's stewardship of several other of its stations. *I.D.*, at n.1. Also before the ALJ was KSOL's 1980 renewal application, against which were filed the competing applications of Afro and SMBC. *Id.*, para. 1. As United argued in the WOOK-FM proceeding,[22] IRI here argues that "[o]nly the three-year renewal period immediately preceding the filing of

[19] While we also noted in the WOOK-FM proceeding that the history of "that" station was *generally* without serious violation, 94 FCC 2d at 945, we have laboriously explained in that case and hereinabove why the deplorable record of WOOK-AM was — under the unique circumstances there obtaining — to be factored into our predictive judgments about the current WOOK-FM.

[20] This concept, however, is alien to our legal system. *See* U.S. CONST. art. III, §3, para. 2.

[21] IRI Exceptions at 9 n.6.

[22] *See* 94 FCC 2d at 940-941.

competing applications should be examined for comparative purposes to determine whether an incumbent licensee's performance has been substantial."[23] The *I.D.* (at paras. 7-29, 55-60) surveyed the entire record of KSOL's performance since its last renewal in 1968 in assessing the station's record, and the Mass Media Bureau as well as the other applicants support the ALJ's temporal scope of review.[24]

9. The imbroglio over what constitutes the KSOL "record" for instant comparative purposes was previewed nearly two years ago at an interlocutory phase of this proceeding when, during the discovery stage of the hearing, IRI requested a protective order from the Board (already denied by the ALJ) exempting discovery of all of KSOL's programming records, save those from the three-year period immediately preceding its 1980 renewal application. *Intercontinental Radio, Inc.*, 90 FCC 2d 935 (Rev. Bd. 1982). While sensitive to the fact "that the period of time that has elapsed since Intercontinental last received a regular renewal is unusually extensive and that the licensee may not be able to fully reconstruct its record of the entire 13 year period," *id.*, at 936-937, the Board nevertheless held that any such available material was — at least — relevant and discoverable. *See id.*

10. A further foretaste of our views on the merits of this matter was provided, of course, in our WOOK-FM decision where we addressed the identical argument that only the "most recent license period" constituted the station's "record."[25] Therein, we rejected United's hard core contention that prior license periods — unreviewed by the Commission for purposes of making the mandatory public interest finding necessary for license renewal (47 U.S.C. §§ 307-309) — were wholly irrelevant in a comparative renewal context.[26] In so ruling, we not only examined Commission precedent[27], we doubted that — had such been found here —

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[23] IRI Exceptions at 8. IRI's argument is rather refined; it does not deny that its entire record is relevant for purposes of its "basic" qualifications. *See id.*, at 9-10. It now argues that only the most recent record is relevant for "comparative" purposes. *Id.*, at 10-13.

[24] M.M. Bur. Reply at 3-4; SMBC Reply at 1 n.1. *Cf.* Afro Reply at 2.

[25] *See* 94 FCC 2d at 940-941, 950. *See also George E. Cameron, Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789, 794-796 (1983) (applications for Comm'n review pending).

[26] *See id.*

[27] It has been the Commission's practice to peruse a station's record prior to the most recent "regular" renewal period where that "regular" three-year renewal has been withheld because of questions relating to its performance or qualifications. *See, e.g., Lamar Life Broadcasting Co.*, 14 FCC 2d 431, 434 (1968) (subsequent history omitted) where the Commission — in the context of a 1964 renewal application and petition to deny — considered the station's record going back to 1955.

In part, the practice of looking all the way back to the time of the last "regular" FCC renewal may be tied to the fact that — if a "regular" renewal was in hearing status —

we could simply ignore any serious violations of FCC rules or egregious misconduct in prior, unreviewed license periods merely because of the passage of the "regular" renewal period wherein all geographically-kindred stations are regularly scrutinized.[28] Additionally, the Commission has never suggested that the expiration of a "regular" renewal period would operate, as the IRI paradigm would imply, as a migratory statute of limitations on a deferred renewal applicant's record and whose license renewal was singled out precisely because of serious questions about its renewability.[29] Indeed, to the extent that the *Designation Order* in this case expressly called for the examination of conduct by a United corporate principal which the Commission *knew* had preceded the most recent license period (*see id.*, at para. 14), our convictions regarding this matter are reinforced.

11. Although holding that a station's entire record *heretofore unreviewed for renewal purposes* was open to scrutiny, our WOOK-FM decision also recognized that all of our licensing proceedings are keyed toward a useful prediction of future performance. In the case of wholly new applicants, our predictions, of necessity, must be based primarily on "structural" ownership indicia while, in the case of a renewal applicant, we have a far surer index: the station's actual record. "Comparative renewal" proceedings are a somewhat awkward hybrid, about which much has been written and litigated. *See, e.g., Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983); *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983). Inasmuch as the Commission's prognosis of future licensee performance should be rooted, to the extent possible, on real-world experience, *see, e.g., FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775,

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the licensee was relieved from filing updated applications every three years thereafter. *See Committee for Open Media* v. *FCC*, 543 F.2d 861 (D.C. Cir. 1976).

IRI argues that had the Commission not deferred action on its earlier three renewal applications, KSOL's record during those prior periods would have clearly warranted — at a minimum — renewal, and that the instant comparative case would, by operation of law, settle exclusively on its 1977-1980 record. IRI Exceptions at 10-11. We are not prepared to say that IRI is theoretically incorrect, and we note that the agency has recently changed its practice of deferring consideration of the status of other co-owned stations where significant questions are raised as to the licensee's qualifications. *James S. Rivers*, FCC 83-48, released February 18, 1983. It said: "We now believe . . . that we should definitely determine the status of commonly owned stations at the time of designation [of the lead station]." *Id.*, at para. 3. Hence, we trust that the question raised here will be obviated in the future.

[28] "Regular" license renewals are triggered in geographical batch according to the state of license. 47 CFR § 73.1020.

[29] *Compare* 47 U.S.C. § 503(b)(6) (as amended Pub.L. 95-234, approved February 21, 1978, 92 Stat. 33) where Congress *did* impose a statute of limitations insofar as the imposition of monetary forfeitures.

814 (1978), we signaled in WOOK-FM that a station's "most recent license period (prior to the filing of competing applications) is the *most probative* in terms of predictive value. . . ." 94 FCC 2d at 950 (emphasis added). We qualified our heightened predictive reliance on the "most recent period" by completely discounting the weight of station performance rendered after filing by a competing applicant.[30] The rationale for that WOOK-FM ruling was not unrehearsed. *See* 94 FCC 2d at 949 (*quoting Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 712-713 (Rev. Bd. 1982) ("In general, then, and in the future, we believe that programming evidence accruing after the filing of a competitive application is *post litem motem* and thus entitled to reduced weight.")). *See also George E. Cameron, Jr. Communications, supra* note 25.[31] Neither the ALJ nor the competing applicants dispute the Board's WOOK-FM premise that the most recent (pre-"challenge") license period is generally the *most* reliable indicator of future performance.

12. Accordingly, our review of the KSOL-FM record covers the entire period unreviewed by the Commission for purposes of determining its renewal prospects. Although the period here under scrutiny is painfully long, we believe that this broader perspective is much more reliable in forming solidly-grounded, predictive judgments — both basic and comparative — providing, as it does, a wider window through which to scan the course of a station's performance over the long-term rather than the (heretofore) "regular" three-year spot check.[32] And by giving heightened predictive weight to actual performance in the most recent license period (prior to formal "challenge"[33]), an extended review of KSOL's record

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[30] Even IRI does not complain about discounting KSOL's performance *after* the competing applications were filed; and it almost appears to accept our ruling in WOOK-FM that the entire station record is relevant *if* emphasis is placed on the most recent period. *See* IRI Reply at 17-18.

[31] Our reasoning in *Cornwall* and *Cameron* was shaped to conform to the policy contours etched in *Alabama Educational Television Comm'n*, 50 FCC 2d 461, 476 (1975) (broadcast performance after a renewal "challenge" is mounted entitled to little predictive weight).

[32] Apparently Congress concurred in the view that a longer license term might provide a better performance index, for it recently extended the maximum length of commercial radio station licenses from three to seven years. 47 U.S.C. §307(c) (as amended by Pub.L. 97-259, approved September 13, 1982, 96 Stat. 1087, 1093). Thus, in the future, it could be that IRI's assertion that only the "most recent license period" need be examined will carry more weight, and a "last license term" limitation on retrospective FCC scrutiny would seem reasonable, lest a licensee be compelled to prove its renewability by a fourteen (or twenty-one) year old record. (*See also supra* note 27.)

[33] At oral argument, there was some confusion as to the weight to be given to KSOL's post-1977 performance because of the uncertainty as to when the actual "challenge" to its license (*i.e.*, a petition to deny) had been mounted. *See, e.g.*, Tr. of Oral Arg. at 2789 *et seq.* That uncertainty has been dissolved: no petition to deny was filed against KSOL-FM until November 3, 1980. *Designation Order* at para. 1 (& paras. 2-8).

permits us to track any clear trends or patterns, including evidence of degradation of, or improvements in, station service to the public.[34] Our review of the KSOL-FM record follows.

13. *1968-1971.* KSOL's 1971 renewal application indicated that, during the 1968-71 "composite week,"[35] KSOL broadcast 5.00% news and 7.79% total non-entertainment programming. *I.d.*, para. 8. KSOL-FM regularly broadcast news, most of which was selected and edited from the Associated Press wire. Newspapers and magazines served as a source of information for lighter local news. About 25% of news program time was devoted to local and regional news. *Id.*; San Mateo Exh. 9 at 43. The station also broadcast 220 public service announcements (PSAs) during the "composite week." *I.d.*, para. 8. Operations manager Mrs. Genevieve Garcia directed IRI's survey of community needs and problems: a random survey of more than 75 members of the general public was undertaken and, in addition, the station interviewed 96 community leaders including John Condon, Mayor of San Mateo; Donald E. Mueller, City Manager; L. C. Marvin, Director of the San Mateo Community Service Center; representatives of the Economic Opportunity Commission and the Community Youth Responsibility Program; Donald McLarman, Regional Director of the Small Business Administration; Louise Hanford, Director of the Japan Center; Alfred J. Nelder, Chief of Police for the City and County of San Francisco; Audrey K. Doughty, Director of the YMCA of San Francisco; Guadalupe Banuelos, President of the Mexican Organization Festivities Committee, Inc.; representatives of colleges in San Mateo and the surrounding area; and Gene Taylor, Director of the San Mateo County Medical Society. San Mateo Exh. 9 at 21-34. The interviewees identified ten categories of significant local problems and needs: drugs, crime, unemployment, ecology, pollution, venereal disease, housing, welfare, mental health, and public information. *Id.*, at 35. KSOL indicated that it would respond to these needs largely through interview program-

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[34] Despite the Commission's hard line in *Alabama Educational Television Comm'n*, *supra* note 31, against consideration of post-term "upgrading" in the face of a petition to deny, the Commission even there stated:

> Evidence of improved performance may in some circumstances be advanced by a renewal applicant as evidence of his [sic] willingness to correct deficient license term performance. However, as we noted in designating this issue for hearing, the weight to be accorded upgraded performance must necessarily depend on the seriousness of the deficiencies in the renewal applicant's license term performance.

50 FCC 2d at 476 (footnote omitted). Because ours is a comparative case, we have considered *none* of the KSOL-FM record after 1980.

[35] The "composite week" is a random amalgam of seven different days of the license term selected *post hoc* by the FCC as a "surprise test"; it is used as the primary basis for evaluating past performance in the next renewal application. *See, e.g.*, FCC Form 303-C, Instructions, p. 1 (September 1981).

ming. *Id.*, at 36-38. Furthermore, KSOL featured programs of interest to the Spanish-speaking communities and other foreign-oriented listeners; it broadcast 105 hours of Spanish, 25 hours of Portuguese, 3 hours of Italian, 5 hours of Japanese (and 2 hours of Irish-oriented material) in the "composite week." *Id.*, at 10.

14. KSOL's "composite week" logs, by which renewal applicants are judged on their efforts, reflected the following programs: "Navy Show" (6:00-6:15 a.m., Sunday) directed to young men and women to provide better understanding of the Navy and its available educational opportunities; "Radio Free America" (3-4 minutes at 2:30 p.m., Mon.-Fri.), aimed at informing the Latin American audience of developments in Latin American countries; "Community Calendar" (5 min. ROS, morning, afternoon and evening, local), public information and events received from organizations; "Bible Speaks To You" (7:45-8:00 a.m., Sunday, recorded), religious sermon; "Apostolato Christiani" (9:30-10:00 a.m., Sunday, local), religious programming for the sick and shut-ins; a cultural/PA program (4:30-5:00 p.m., daily) information about different cultures and agricultural conditions; "Mensaje de Esperanza" (13-14 min., 8:00-8:15 a.m., Mon-Sat.), religious program about family problems; "Palabras de Aliento" (29 min., 4:30-5:00 p.m., Sunday, local), religious program aimed at promoting compassion toward one's neighbors; "Children's Story Time & The ABC's" (3:31-3:40 p.m., Sunday, local), educational program for children aimed at developing reading skills; "Interview Time" (3:31-3:45 p.m., once a month on Wednesday, local), discussion with representatives of civic organizations; "World of Sports" (5:00-6:00 p.m., Sunday, local), information and comments on sports. *Id.*, at 39-42.

15. *1971-74.* KSOL's 1974 renewal application reflected "composite week" programming of 5.45% news and 6.61% overall nonentertainment programming. *I.d.*, para. 10. But, because of KSOL's 1972 change to a black-oriented format, IRI submitted that the "composite week" figures did not accurately reflect its performance during the license term. With its renewal application, it tendered figures for the month of May 1974, which figures reflected 7.36% news and 10.77% overall nonentertainment programming. *Id.* KSOL-FM claimed two employees who gathered local and regional news, and it indicated that 30% of its news time was given to local and regional stories. It also subscribed to both the National Black Network and the Associated Press.[36] *Id.* It broadcast 235 PSAs during its "composite week." Under the direction of Michael Harvey, its Quality Control Director, KSOL-FM surveyed 62 community leaders, including

[36] On the other hand, Peggy Ann Wedlow, first a volunteer worker at KSOL-FM during 1971-72 and then a paid employee until the fall of 1974, testified that, prior to 1974 when Clarence Johnson was hired, no individual was solely responsible for news and that announcers would read news off the wire. *I.d.*, para. 21. *But see* IRI Exceptions at 18.

representatives of: Planned Parenthood Association of San Mateo County; area police departments; area mayors and councilmen; Better Business Bureau; humane society; National Council on Alcoholism; American Red Cross; Boys Club; Girl Scouts; Lions Club; American Business Women's Association; and Pan American League. San Mateo Exh. 8 at 18-23. A random survey of more than 150 members of the general public was also conducted. From these surveys, twelve categories of local community problems were identified: financing of civic projects, crime, inflation, poor educational systems, transportation, jobs, housing, government facilities, needs of the elderly, racial tensions, recreational facilities, and lack of citizen involvement in local government. *Id.*, at 24. KSOL-FM proposed to respond to these problems through discussion and interview-type programming, and by numerous PSAs. Id., at 25-28. Programs broadcast during the year preceding the filing of KSOL-FM's renewal application included: "Say It Loud" (6:30-7:00 a.m., Sat & Sun., part of local and part recorded), black community leaders and representatives, plus listener letters and editorial opinions; "Community Calendar" (10:00-11:00 a.m., Mon.-Fri., part local and part recorded), highlights of local events, including interviews with prominent citizens; "Message of Hope" (5:45-6:00 a.m., Mon.-Fri., recorded), religious inspirational messages; "Rap 'n Rhythm" (5:30-5:45 a.m., Sat., recorded), military career opportunities for the unemployed; "Black Issues and the Black Press" (6:00-6:30 a.m., Sun., recorded). "Meet the Press"-type format examining how the black press treats black issues; and "Religious Hour" (6:00-7:00 a.m., Mon-Fri., local), black-oriented gospel music and messages. *Id.*, at 31.[37]

16. IRI's December 4, 1973 amendment to its 1971 renewal application explains how the station's programming was modified when it changed to a black-oriented format, San Mateo Exh. 15. Sixty-three community leaders had been interviewed to ascertain the needs of the black community, and 14 problem categories were identified. *Id.*, at 3-11. Based thereon and the format change, foreign language programs were eliminated, some public affairs programs were altered to better attract the target audience, and other public affairs programs were added. *Id.*, at 12-

[37] However, one witness, Frederic Howell, testified that he did not hear much nonentertainment programming on KSOL-FM during 1972-76 and that, during 1972-75, the station did not assist the community organizations with which he was involved. *I.d.*, para. 26. Complaints concerning KSOL-FM's community responsiveness, programming, and employment and labor practices were received by the North Central San Mateo Neighborhood Council, Inc., which requested — and was granted — a meeting with the station's general manager. From 50 to 75 members of the community attended this meeting. *Id.* Another witness, Sylvester Hodges, community services manager in special community relations for the San Mateo Parks and Recreation Department, testified that various PSAs that he submitted to KSOL-FM were either not run or were run at inappropriate times of day. *Id.*, paras. 27-28.

14. The weekly program "Community Affairs," an hour-long broadcast, was designed to interview civic representatives and contained a 10-minute segment publicizing employment opportunities. The program "Betty's World," featuring a black woman announcer, was designed to deal with problems of special concern to Black women in the community and to provide guidance as to where assistance could be obtained. The public affairs program "Say It Loud," scheduled Saturday and Sunday at 6:30 a.m. to 7:00 a.m., discussed topics of concern to listeners, who were invited to speak out on controversial topics, and letters from listeners were read over-the-air. "Mental Health Matters" was a weekly program, aired for 15 minutes on Friday, which featured different speakers and which was recorded from the Department of Health, Education and Welfare. The U.S. Army-produced "Rap & Rhythm" aired twice weekly at 5:40 a.m. to 5:45 a.m. "Message of Hope," a religious program, was aired daily at 5:45 a.m. to 6:00 a.m. *Id.*

17. Fourteen unsolicited letters received by KSOL were filed with its December 4, 1973 amendment to its renewal application for the 1974-77 renewal term. *Id.*, at 15-28. Two of those thanked the station for various efforts in promoting scholarships for blacks. *Id.*, at 15, 16. Four others expressed appreciation for publicizing or performing at school fundraising events. *Id.*, at 17-20. A KSOL-FM announcer was nominated by the Concerned Citizens for Oakland Boys' Club as an "Image Builder" for outstanding achievement and contributions. *Id.*, at 21. Mayfair Neighborhood Center expressed gratitude for the appearance of a KSOL announcer at its teen functions, stating that "KSOL is a leader in the area of community involvement." *Id.*, at 22. The County of Santa Clara thanked KSOL for announcing various bulletins regarding county employment, many of which resulted in inquiries from employment-seekers. *Id.*, at 23. The City of San Jose also utilized KSOL employment announcement. *Id.* at 25. KSOL assisted the Miss Black Teenage San Jose Pageant. *Id.*, at 24. The station publicized upcoming football games for the Toliver Community Center. *Id.*, at 26. An advertiser congratulated the station for its community responsiveness. *Id.*, at 27. Finally, the University of San Francisco credited a KSOL PSA with turning a projected 10% decrease in evening enrollment into an increase. *Id.*, at 28.

18. *1974-77.* KSOL's 1977 renewal application reflected "composite week" programming of 5.8% news, 1.3% public affairs, and 3.3% "other nonentertainment" for a total of 10.4% nonentertainment programming. *I.d.*, para. 11. The logs showed 367 PSA's during that week. *Id.* However, the 1977 renewal application contained a caveat that the "composite week" figure for "other nonentertainment" programming was not representative of its ordinary performance, and it asserted that KSOL-FM actually broadcast approximately 500 minutes of such programming

(which equates to about 5%). San Mateo Exh. 17, at 20. In conducting its 1977 ascertainment of community needs and problems, IRI interviewed 136 community leaders representing 20 different categories of interests, including agriculture, business, charitable, consumer services, education, government, labor, minority groups.[38] Ten major categories of local problems were identified in 1977, including alcoholism, fire prevention, senior citizens, health, crime, government, and education. *Id.*, at 10. Programs responsive to the foregoing categories were aired, including, for example, interviews with: a representative of the Women's Rehabilitation Association (exploring alcoholism and women); an official of the San Mateo Fire Department; the area coordinator of Women Against Rape (discussing community awareness, criminal enforcement, and psychological harm); the director of the College of San Mateo's College Readiness Program (discussing admittance of minorities and veterans into college). *Id.*, at 11-12. Problem areas were likewise identified by the station in 1976; and KSOL-FM claimed public affairs programs responsive to these. *Id.*, at 13-16. The station's "composite week" program logs for 1976 identified the following programs: "Black Forum" (7:29-7:59 a.m., 6/13/76, local), a public affairs discussion program; "One Black Man's Opinion" (6:32 p.m. for 2½ minutes on 8/4/75 and 2½ minutes at 6:30 p.m. on 10/30/75), a representative of the National Black Network stated his opinion on national issues; "Human Renaissance" (five occasions at 10 minutes each), concerning black American history; "Community Billboard" (10 minutes at 11:33 a.m., 3/6/76, local), announcements for upcoming community events; "NBN Story Hour" (55 minutes at 6:05 a.m., 6/13/76), general discussion program with prominent black citizens; "KSOL Trainee Program" (29 minutes at 7:00 a.m. on 6/13/76, local), on-the-air broadcasting training for youth including interviews and youth panel discussions; "Gospel Train" (2 hours 15 minutes at 8:42 a.m., 6/13/76, local), gospel music and church announcements; "Message of Hope" (7 occasions at 12-15 minutes, 8:30 a.m.), religious thought; and "What's Going On" (1 minute at 8:06 p.m., 11/21/75, local). "a survey of items of community interest." *Id.*, at 18-19.

19. At hearing, IRI submitted into evidence statements of community witnesses concerning the station's responsiveness to the community; eleven of these witnesses referred to contacts with the station during the 1974-77 license term. *I.d.*, para. 24; KSOL Exh. 66. Jane Baker, Mayor of the City of San Mateo, had appeared in a KSOL-FM public affairs program. KSOL Exh. 50. Carol Dilfer, former Director of Public Information for Planned Parenthood of San Mateo County, worked with KSOL's Bill Harrison in producing and airing 10, sixty-second PSAs on a variety of

[38] 42 of the (136) interviewees were from the minority community and 53 were women. *Id.*, at 9.

health topics. KSOL Exh. 59. Based on this (and subsequent involvement with the station during 1978-80), Ms. Dilfer lauded the station for professionalism, follow-up, and its genuine interest in the county which, in her opinion, exceeded that of the other area stations. *Id.* Miriam L. Gholikely, the Assistant Director of the Community Service Center (a Dale City social service agency) and the Vice-Chairperson of the Commission on Aging for San Mateo County, stated that, in 1977, KSOL offered to publicize relevant public service activities. KSOL Exh. 62. Based on her involvement with the station since that time, she commended KSOL's service to the community. *Id.* Rosemary Hood, Program Manager and Public Information Officer for the Parks and Recreation Department of the City of San Mateo, testified that KSOL broadcast announcements for the entire City of San Mateo, as well as her own department. KSOL Exh. 66. Hewitt Joyner, Executive Director of the Black Council of Santa Clara County, Inc. (BCOSCC), a community service organization specializing in alcoholism and vocational counseling, has had contact with KSOL-FM since 1972 when he was employed by the local school district. KSOL aired free promotions for Joyner's school projects. Since 1976, KSOL has broadcast material about BCOSCC's activities and Joyner praised the station's responsiveness. KSOL Exh. 69. Dorothy A. Mullen, a teacher/counselor for the Hayward School District, and founder and president of College Bounders Committee, Inc., a non-profit organization concerned with the access of Bay Area youth to post-secondary education and employment opportunities, has produced and hosted "Educational Tips" on KSOL-FM since 1977. KSOL Exh. 77. John J. Norton, Chief of Police of Foster City, California, and current Vice President of the International Association of Chiefs of Police, stated that "KSOL has displayed a true concern for Bay Area communities and a desire to serve these communities by broadcasting programs pertaining to crime prevention and police community relations" based on his contacts with KSOL since 1974. KSOL Exh. 80. Chief Norton characterized his police department's relationship with the station as "excellent," and he complimented KSOL's "community involvement." *Id.* Nevida Preston, formerly with the Red Cross and currently the Executive Director of the Ecumenical Hunger Program, has dealt with KSOL-FM since 1974. The station assisted her by broadcasting material concerning the Red Cross. KSOL Exh. 81. Based thereon (and subsequent KSOL community involvement later on), she praised the station's "outstanding job for the two organizations for which she has worked," and Ms. Preston stated that KSOL-FM "is respected in the community for the work it has done." *Id.* Charles Range, since 1975 the Executive Director of the Drew Medical Center in East Palo Alto, has used KSOL-FM to publicize activities concerning both Drew Medical Center and the San Mateo Probation Department. KSOL Exh. 84. Mr.

Range opined that KSOL-FM is "well-accepted in the minority community" and that it appeals to many different groups. *Id.* Bradford Stamper, former Mayor and current Municipal Council Member of East Palo Alto, indicated that, in 1977 "KSOL produced and aired a public affairs interview with him about the [Crime Prevention] Program which provided the Program with the kind of publicity it needed in the community." KSOL Exh. 91. Based on this and subsequent involvement with the station, he "commends KSOL for initiating contact with him to collect information which is of concern to the public." *Id.* Mayor Stamper listens daily to KSOL-FM news broadcasts and considers them to be "pertinent." *Id.* Richard Ward, Executive Director of the Peninsula Humane Society of San Mateo County, indicated that his organization has used KSOL-FM for many years. The station has provided publicity for the Humane Society and has covered important Humane Society concerns in its news. Mr. Ward cited as an example a KSOL-FM news story dealing with the increased and dangerous ownership of pit bulls. He stated that "Station KSOL's coverage for his organization is equal to the other prominent radio stations in the area or better because Station KSOL has a San Mateo County emphasis." KSOL Exh. 97.

20. *1977-80.* Station KSOL-FM's broadcast record for the most recent license term (1977-80) was more fully detailed by the ALJ and not much need be added. *See I.d.*, paras. 12-18, 22-25, 27-29, 57. In brief, KSOL-FM's 1977-80 "composite week" reflected programming of 5.04% news, 1.49% public affairs, and 5.13% "other nonentertainment" — for a total of 11.66% nonentertainment programming; during that sample week the station broadcast 242 PSAs. *Id.*, para 12. The ALJ found that, since 1977, KSOL-FM's news department has consisted of a news director and 2 fulltime and 2 parttime employees. Some news coverage is live; other news stories develop through telephone contacts — some initiated by the station and others called in to the station by news sources. Numerous taped interviews were also used for news programming, as were the wires from the Associated Press and the National Black Network. Special interview-type programming and live political coverage were also broadcast. *Id.*, para. 13. A multitude of community witnesses testified as to KSOL-FM's community responsiveness. *Id.*, paras. 23-24. Letters produced by IRI pointed to significantly increased community involvement by the station after the station's hiring of Bill Harrison in September 1977 and Eleanor Curry in early 1978. KSOL Exhs. 45-100.

21. During the 1977-80 license term, KSOL-FM interviewed 261 community leaders as part of its ascertainment process, including: George Caravalho, Assistant City Manager, City of San Mateo; Julius F. Castelan, Director, Bay Area Mexican American Political Association; Lou Clarida, Personnel Officer, San Mateo Equal Opportunity Commission; Kay

Coiner, Assistant Executive Director, San Mateo County Medical Society; Pat Colby, Associate Executive Director, Planned Parenthood of San Mateo County; J. Laverne Coppock, Chief, San Mateo Police Department; Ortensia Lopez, Manpower Specialist, Urban League; and Kathye McCall, trustee, San Mateo Suicide Prevention Board. KSOL Exh. 43, Appendix C at 1-40. These ascertainment efforts uncovered significant problems and needs in the following 14 categories: drug abuse, economics, education, employment, environment and energy, government and politics, handicapped persons, mental health, physical health, housing, transportation, law, senior citizens, and youth. *Id.*, at 38. A cornucopia of programming addressed to these issues was broadcast by KSOL-FM during the license term. *Id.*, at 38-68. For example, the show "Focus on Alcoholism," broadcast on 9 occasions from February 12 to June 4, 1978, discussed various issues surrounding that problem (and drug abuse); "Magazine II," aired on March 12, 1978, dealt with corruption in California's drug abuse program; "People in the Community" on 2 occasions discussed drug abuse programs in San Mateo County; and "Crime, the Courts and You," broadcast on 6 occasions from May 15, 1979 to July 20, 1980, covered alcoholism treatment, effects of and treatment for P.C.P., causes and effects of alcoholism, and drug rehabilitation. *Id.*, at 39. Similarly, economic issues were aired on 21 occasions during the license term; programs pertaining to education, 65 times; employment, 25 times; environment and energy, 8; government and politics, 59; handicapped persons, 77; mental health, 55; physical health, 35; housing, 6; transportation, 15; law, 68; senior citizens, 33; and youth, 36. *Id.*, at 40-68.

KSOL-FM Record v. "Comparative Renewal" Standard

22. As a predicate to our review of the ALJ's assessment of the KSOL record, and especially for the uninitiated, it is useful to briefly map out the legal route through which a "comparative renewal" record must pass so that we have our proper bearings before proceeding to our final destination. Unlike conventional licensing proceedings conducted under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), a competitive contest involving the frequency of an incumbent licensee factors in the generally agreed upon caveat that the Communications Act implicitly contains "legitimate renewal expectancies" for incumbents who have served the public interest. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Or, as the Supreme Court has annunciated:

> Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause.

FCC v. *National Citizens Comm. For Broadcasting*, 436 U.S. 775, 805 (1978) (*quoting Greater Boston*, supra). After constructive interchange between the Commission and the U.S. Court of Appeals for the D.C. Circuit, the agency and the judiciary appear to have reached a rapprochement on the dynamics of exactly how an incumbent licensee is to be comparatively measured against newcomers.[39] After sketching the history of "comparative renewals" and reviewing the Commission's formulation of the appropriate comparative standard, the court said:

> We believe that the formulation by the FCC in its latest decision, however, is a permissible way to incorporate some renewal expectancy while still undertaking the required comparative hearing. *The new policy, as we understand it, is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy 'weight.'*
>
> In our view [states the FCC], the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the 'expectancy' takes the form of a comparative preference weighed against [the] other factors. . . . An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference.

Central Florida Enterprises, Inc. v. *FCC, 683 F.2d 503, 506 (D.C. Cir. 1982), cert. denied*, 103 S.Ct. 1774 (1983). Cognizant of the template crafted by the Commission and accepted by the court, we must determine whether the ALJ correctly applied that template to the record of KSOL-FM and the potential of the challengers.

23. In short, the ALJ held "that the performance at KSOL from 1969 to 1977 was no more than minimal," *I.d.*, at para. 56; that [t]he years 1978-1980 are different," and that "[t]he performance during these years was substantial." *Id.*, at para. 57. Factoring in the records of WOOK-AM and WFAB-FM, the ALJ calculated his ultimate conclusion in a two-sentenced paragraph:

> 59. Intercontinental's substantial performance from 1978 to 1980 must be weighed with its no more than minimal performance during the earlier years and the United record at WOOK(AM)-WFAB. The total record is a minimal one.

IRI was awarded no "renewal expectancy" whatever, *id.*, para. 60, and was thus compared to the two competing applicants generally as if it were a newcomer under the 1965 *Policy Statement, supra.* Because of United's corporate ownership of other broadcast stations, IRI's comparative elimination from the remaining contest was instantaneous. *Id.*

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[39] *But see Committee For Community Access* v. *FCC*, No. 82-2314 (D.C. Cir. June 15, 1984) (remanding the "comparative renewal" case decided *sub nom. Simon Geller*, 90 FCC 2d 250 (1982)).

24. For its part, Afro does not take direct exception to the ALJ's description of the KSOL record.[40] SMBC excepts to the conclusion that KSOL's performance in the most recent (pre-"challenge") license period was "substantial."[41] The Mass Media Bureau (1) supports the conclusion that KSOL's most recent performance was "substantial," but (2) contends that KSOL's 1968-1977 performance was "more than 'minimal'."[42] As might be expected, IRI argues (1) that KSOL's entire record is 'substantial," and (2) that, in any event, so long as the ALJ found that its performance in the most recent license period was "substantial," it is entitled to a "renewal expectancy" and, therefore, the license.[43]

25. We are compelled, before we grade the KSOL record, to preface our attention by noting that the record in this case shows many similarities to the description of the record in the WOOK-FM proceeding: to wit, both the record in the WOOK-FM case and here are not thick with regard to the license periods prior to the most recent (pre-"challenge") license period[44]; both stations changed formats during the review period from Spanish language to a black-oriented format — KSOL-FM in 1972; WOOK-FM in 1976. In WOOK-FM, the ALJ considered the record in its entirety and pronounced that "[t]he total record is no better than minimal."[45] Although we did not agree with all aspects of the ALJ's legal analysis, we did agree that WOOK-FM's overall record could not be considered "meritorious" and that it was not entitled to a "renewal expectancy." However, it is critical to recall that our "bottom-line" conclusion that the record of WOOK-FM was not "meritorious" was

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[40] It does except to the ALJ's failure to add a misrepresentation issue based on IRI's alleged puffing of its 1977-1980 news. Afro Exceptions ("Limited") at 2-8.

[41] SMBC Exceptions at 4-13.

[42] M.M. Bur. Reply at 5. More fully, the Bureau asserts:

> Although the Bureau does not necessarily agree that the past broadcast record of IRI from 1967-77 was 'substantial,' it does believe that the record was more than 'minimal' and should not prevent the awarding of a 'renewal expectancy.'

Id., at 4-5. SMBC asks that we strike that portion of the Bureau's reply comments (under 47 CFR §1.277(a)) because the Bureau filed no exceptions to the *I.d.* We agree with SMBC, particularly since "the Bureau did not participate in the hearing on the aspect of 'renewal expectancy.' " M.M. Bureau Opposition to Motion to Strike at n.1. Its 25th hour views on this matter will be disregarded.

[43] *See* IRI Exceptions at 8-13. It also argues that the records of WOOK-AM and WFAB should not have affected its "expectancy." *Id.*, at 33-42. We have dealt with that particular matter *supra*, paras. 5-7.

[44] *Compare I.d.*, para 7, *with United Broadcasting, supra*, 94 FCC 2d at 947-948 (para. 18); *id.*, at 990 (ALJ). In *United Broadcasting*, both we and the ALJ noted that "United offered no direct case respecting its pre-1975 broadcast record" (*citing* United's own Proposed Findings, para. 55).

[45] 94 FCC 2d at 995 (para. 114).

colored dispositively by the prior WOOK-AM misconduct. We specifically agreed with the ALJ that:

> . . . the *overall* performance evaluation that constitutes the renewal expectancy analysis encompasses licensee *conduct as well as program performance,* for both factors have important predictive value and must be weighed *simultaneously.*

94 FCC 2d at 950 (emphasis added). We then factored into WOOK-FM's twelve-year record the continuing WOOK-AM relationship as a strong predictive factor and concluded that — *even if the entire twelve year performance period had been "substantial"* — "that conclusion would be offset by United's past conduct, primarily at WOOK(AM)." *Id.*

26. While there are many surface similarities between the WOOK-FM record and the instant one, there are some telling differences as well. First and foremost, there are no record circumstances that would create the same firm predictive value of the WOOK-AM misconduct in the case of KSOL-FM (*see supra,* paras. 5-7). Second, even if only marginally so, there appears to be somewhat more evidence in this record from which to cull a long-term performance profile of KSOL-FM than there was in WOOK-FM where United chose to present "no direct case" whatever of its performance prior to its most recent license term (*see supra,* note 44).[46] While its comparable showing here was skeletal because of the alleged nonexistence of most pre-1977 programming records, *I.d.,* para. 56, there is nonetheless some showing. *Id.*

27. SMBC challenges the ALJ's conclusion that KSOL's most recent performance was "substantial"; the heart of its charge is directed to the quantity of news and nonentertainment broadcast by the station.[47] Afro, as noted, did not except to the ALJ's characterization of KSOL's performance levels during the various license periods.[48] As a matter of law, then, we must conclude that Afro accepts the ALJ's characterization. 47 CFR §1.277(a). As to the quantity of nonentertainment programming, SMBC submits that whereas KSOL-FM — for example — broadcast 11.66% nonentertainment programming in the more recent period,[49] WOOK-FM "was providing 16.2 percent nonentertainment programming."[50] With respect to prior license periods, it asserts that KSOL's "percent of non-entertainment programming was in each period below

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[46] Indeed, in WOOK-FM, United virtually refused to proffer evidence of its pre-1975 record, insisting that such evidence was irrelevant. *See* 94 FCC 2d at 946-947. While IRI's legal theory here remains consistent (*see supra* para. 8), its conduct of this case appears a bit more forthcoming. *See* IRI Exceptions at 14 n.12. *See also supra,* paras. 15-19.

[47] *See, e.g.,* SMBC Exceptions 8-11; SMBC Reply at 1-3.

[48] *But see* Afro Reply at 3 n.6, where it belatedly agrees with SMBC's exceptions as to the level of KSOL's most recent performance.

[49] SMBC Reply at 3.

[50] SMBC Exceptions at 11 n.3. It will be recalled that the ALJ found, in fact, that the latter period WOOK-FM programming was "substantial." *See* 94 FCC 2d at 995.

that in the 1977-1980 period."[51] It also compares KSOL's statistics with those of other comparative renewal applicants such as those in the *Central Florida Enterprises* (TV applicant) and *Victor Broadcasting* (AM/FM applicant) cases, *supra.*[52]

28. We need not spin out Disraeli's inevitable *bon mot* about the inconclusiveness of statistics to underscore that the assessment of a licensee's past performance is not a matter of "numbers."[53] Although it is true that the Commission has initially consulted the quantitative breakdown of station program performance in every recent comparative renewal case,[54] it is equally evident beyond argument from case and policy precedent that the statistical breakdown is merely one, *prima facie* indicator of station performance; a quick starting point, but no more than that. For as we observed in the recent. *Kaye-Smith* decision (*supra* note 53), the Commission has historically and persistently refused to equate raw statistical showings with licensee performance for purposes of "comparative renewal" evaluation. Thus, in *Formation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process,* 66 FCC 2d 419 (1977), the Commission purposively and expressly declined to adopt quantitative standards as a determinative yardstick of a "comparative renewal" applicant's record, calling such a potential yardstick "a simplistic, superficial approach to a complex problem." *Id.,* at 429. In sustaining the Commission's foregoing declination, the court disagreed with the appellants' claim therein that quantitative "comparative renewal" standards were appropriate, and it declared:

> As to petitioners' First Amendment claims [in favor of quantitative criteria], their approach would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission. The Act provides broadcasters with broad programming discretion and prohibits the Commission from exercising the power of censorship.

National Black Media Coalition v. *FCC,* 589 F.2d 578, 581 (D.C. Cir. 1978) (*citing* 47 U.S.C. §326). The Commission's rejection of a fix on a station's nonentertainment "numbers" is as sharp today. *Deregulation of Radio* 84 FCC 2d 968, 985-991 (1981), *remanded on other grounds, Office of Communications of the United Church of Christ* v. *FCC,* 707 F.2d 1413 (D.C. Cir. 1983). If there remained any doubt that the proper focus in reviewing an incumbent licensee's record in a "comparative renewal" case

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[51] SMBC Reply at 3.

[52] *Id.,* at 2-3.

[53] We have recently emphasized this point in *Kaye-Smith Enterprises,* 56 RR 2d 252, 259 (Rev. Bd. 1984).

[54] *See, e.g., Cowles Broadcasting, Inc.,* 86 FCC 2d 993 (1981); *Radio Station WABZ, Inc.,* 90 FCC 2d 818 (1982). These decision were affirmed, respectively, as *Central Florida Enterprises, supra,* and *Victor Broadcasting, supra.*

is a *qualitative* and not *quantitative* one, those doubts should have been forever dispelled by the court's clear language in *Victor Broadcasting, supra:*

> If the [incumbent] station provides independent programming, the fact that the challenger *proposes* more hours of non-entertainment programming than the incumbent *offers*, does not automatically entitle the challenger to the incumbent's license. The Commission could reasonably conclude that the public interest would not be served by replacing a known-quality service with a greater amount of possibly inferior service. *Simply, quantity may not always be better than quality.*

722 F.2d at 762-763 (emphasis added; footnote omitted).[55]

29. The correct regulatory benchmark for measuring a licensee's performance was presaged nearly a quarter-century ago when a Commission opined:

> The confines of the licensee's duty are set by the general standard 'the public interest, convenience or necessity.' The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this he has met his public responsibility.

En Banc Programming Inquiry, 44 FCC 2303, 2312 (1960).[56] That basic substantive benchmark has not been changed. *See Simon Geller, supra* note 39, where the Commission repeated:

> In evaluating an incumbent's past performance, the Commission has traditionally examined all elements that bear upon the public interest. Generally, however, the licensee's responsiveness to the ascertained problems and needs of its community remains 'central.'

90 FCC 2d at 271 (footnote omitted).[57]

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[55] It was, in part, for the Commission's perceived reliance on raw quantitative differences between the incumbent and the challenger with respect to nonentertainment programming that the court remanded a recent case. Faulting the Commission's comparative analysis, the court observed:

> Hidden in its analysis, the Commission may have been suggesting a new presumption: that diversity of viewpoints if furthered by that applicant which offers *more* informational programming. We reject this reasoning on two grounds. First, this new presumption was adopted silently, without any attempted explanation.

Committee for Community Access v. *FCC, supra* note 39, slip op. at 12 (emphasis in original).

[56] *See also Victor Broadcasting, supra,* 722 F.2d at 761, where the court reflected:

> Past performance must be evaluated with an 'eye toward the public interest,' *Central Florida II,* 683 F.2d at 507 n.16. That is, the FCC must evaluate past performance in relation to the listening audience, in terms of benefit to the public.

[57] As regards our prior discussion of statistics, it is salient that the *Simon Geller* decision noted that his license had been renewed previously on a proposal of less than 1%

30. *Analysis.* In all license periods, IRI appears to have conducted a thoroughgoing ascertainment of community needs and problems; neither the ALJ nor IRI's challengers find fault with KSOL's ascertainment efforts. Still, almost all of KSOL-FM's possible evidence of programs keyed to ascertained areas of concern are derived from "composite week" data, at least until 1972. These sample-week snapshots reveal some programming potentially relevant to the ascertained needs and problems of its audience. It is really not until the mid-to-later 1971-1974 license period, when KSOL-FM changed its format to a black orientation, that the record more clearly begins to reflect programming precisely aimed at the station's primary target, the minority audience. *See supra* paras. 15-17.[58] After 1974, when the record becomes filled in, there are numerous examples of programs tethered visibly to specific problems and needs adduced through the ascertainment process. *See supra* paras. 18-19. From 1977 on, the record is full and IRI's programming responsiveness to its community is supported by abundant evidence. *See supra* paras. 20-21.

31. Another manner of calibrating community responsiveness has also been used. It is bromidic to iterate that a licensee is considered a "fiduciary" to its community, holding that license "in trust" for the community's benefit. A licensee's primary duty, although answerable to the government for the execution of the "trust," is to *its community.* A good gauge of whether the licensee has fully executed its chief duty is feedback from the community. After all, the station's listeners are there day-in, day-out, and the FCC is not.[59] Thus, the "regular listeners are in the *best* position to judge the station's performance." *Radio Station WABZ, Inc., supra,* 90 FCC 2d at 842 (emphasis added). Restating the view of the there-presiding ALJ, the Commission wrote "that a community's estimation of a station's service is *critical* in evaluating its performance." *Id.,* at 837 (emphasis added). The court had observed much the same nearly twenty years ago when it opined that "experience demonstrates consumers are generally among the best vindicators of the public interest." *Office of Communications of the United Church of Christ* v. *FCC,* 359 F.2d 994, 1005 (D.C. Cir. 1966) (Burger, J.). It had earlier in that

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nonentertainment programming, and that the agency "did not question the adequacy of Geller's proposal." 90 FCC 2d at 267.

[58] We recognize that prior to its 1972 format change, KSOL-FM had targeted the Spanish-speaking community and that its "composite week" showings plainly indicated programming of interest to the foreign-language audience. It is not clear from the record, however, that the programming was linked to ascertained "needs" and "problems" of the community.

[59] Currently, we require only the filing of a postcard every 7 years from radio renewal applicants. *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees,* 49 RR 2d 740 (1980), *aff'd sub nom. Black Citizens for a Fair Media* v. *FCC,* No. 81-1710 (D.C. Cir. 1983).

decision invoked "our national tradition that *public response* is *the most reliable test* of ideas and *performance* in broadcasting as in most areas of life." *Id.*, at 1003 (emphasis added).

32. Consistent with that principle, the court in *Central Florida Enterprises, supra,* highlighted the Commission's finding that "[s]even community leaders and three public officials testified that [the renewal applicant] had made outstanding contributions to the local community." 683 F.2d at 508 (*quoting* 86 FCC 2d at 1007). *See also Victor Broadcasting, supra,* 722 F.2d at 762.[60] As to the performance of KSOL-FM in this proceeding:

> KSOL offered the testimony of 50 community witnesses relative to KSOL's service to San Mateo and the surrounding communities. Among these witnesses were mayors and former mayors; members of the San Mateo County and San Francisco County Board of Supervisors; a Municipal Court Judge; local chiefs of police; government officials and agency heads; heads of private civic and human services organizations; and representatives from educational, law enforcement, minority, and social services organizations. These witnesses testified with respect to their familiarity with the programming of KSOL and the other community services which the station has provided.

I.d., at para. 23 (footnotes omitted). The accolades were heavy. *See id.*, at para. 24.[61]

33. After inspecting the evidence of KSOL's performance, the ALJ — as we have said — determined "that the performance at KSOL from 1969 to 1977 was no more than minimal." *I.d.*, at para. 56. Thereafter, he found it "substantial." *Id.*, para. 57. IRI stoutly contends that its record is "substantial" from 1968 onward,[62] while SMBC counters that even the later-period record was not "substantial."[63] We are beholden by precedent to determine whether the ALJ's conclusions accurately portray the performance level of KSOL-FM, for the strength of IRI's "renewal expectancy" hinges on that determination. The Commission's cases reflect a grading scale running from "minimal" to "superior." *Compare Simon Geller, supra* (minimal performance begets bare renewal but no "renewal

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[60] *Cf. Committee For Community Access* v. *FCC, supra,* where the court chided the FCC for its "conclusion that [licensee's] programming is of no value to the community, *despite extensive testimony to the contrary.*" Slip Op. at 12 (emphasis added).

[61] SMBC reports that "[t]wo public witnesses testified adversely to KSOL." SMBC Reply at 6 (*citing "I.d.* at paras. 25 to 29"). It further states: "Clearly, the record shows that KSOL's pre-1977 reputation in the community was poor." *Id.* Apparently, however, a number of KSOL's witnesses recollected the station's positive performance prior to 1977, *see I.d.*, para. 24, a rather remarkable recall. And, as far back as 1973, IRI points to 14 unsolicited letters from "community leaders and members of the community praising KSOL's public service announcements, community service, and participation in non-broadcast community events . . . ." IRI Exceptions at 22 (footnote omitted).

[62] IRI Exceptions at 13-31.

[63] SMBC Exceptions at 4-13.

expectancy"), *with Radio Station WABZ, Inc., supra* (superior performance begets strong "renewal expectancy").

34. Conceding that the labels used to size-up station performance levels may lack clinical precision,[64] we cannot earnestly affirm that the earlier-term performance of KSOL-FM was, *in fact*, "minimal," for the record is simply too sparse to be conclusive. It may have been, "average," or — as IRI contends — it may actually have been "substantial." Nonetheless, the burden of showing that its performance during the period under review is deserving of a solid "renewal expectancy" was on IRI. *See* 47 U.S.C. §309(e) ("The burden of proceeding with the introduction of evidence and the burden of proof [in a renewal hearing] shall be upon the applicant. . . ."). *See generally Office of Communications of the United Church of Christ* v. *FCC, supra.* We have recognized, as we did in WOOK-FM proceeding discussed previously, that the reconstruction of a performance record occurring a decade ago (and longer) might be difficult.[65] Because the earlier-term record of performance is here very similar in makeup to that developed in WOOK-FM, there is again an "insufficient record" to establish by a preponderance of the record evidence that IRI's record was "meritorious," at least during the 1968 to 1974 period.[66] Just as we were not prepared in the WOOK-FM decision to confidently label the earlier performance of that station as "minimal" (as did the ALJ) because of the slim record,[67] we cannot do so here. Conversely, we cannot — for lack of evidence — label it "substantial."[68] What we can say, based on KSOL's extensive ascertainment efforts and the amount and nature of KSOL's nonentertainment programming revealed in the "composite week" material alone, is that the KSOL-FM record was head and shoulders above that shown in *Simon Geller, supra.* But, whatever the level of performance during the years roughly

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[64] *See Central Florida Enterprises, supra,* where the court commented on this condition and suggested that it would be "helpful" if the Commission explained the distinctions, "if any," among:

> . . . substantial, meritorious, average, above average, not above average, not far above average, above mediocre, more than minimal, solid, sound, favorable, not superior, not exceptional, and unexceptional. . . .

683 F.2d at 508 n.27.

[65] *See United Broadcasting, supra,* 94 FCC 2d at 941 (*citing International Radio, Inc., supra).*

[66] *See* 94 FCC 2d at 950.

[67] *See id.* Therein, we did not find it necessary to pontificate over the proper label; we found that the WOOK-AM misconduct so beclouded WOOK-FM's future reliability, United was to be denied a "renewal expectancy" even were we to conclude "that WOOK(FM)'s overall programming performance during 1966-1978 was substantial." *Id.* (para. 22).

[68] While program logs would have provided more information, licensees were required to retain them for only 2 years. 47 CFR §73.1840.

paralleling the duration of the Nixon presidency (even had that level been "superior"), little predictive weight could be accorded in developing an estimation of IRI's probable level beyond the current term of Ronald Reagan.[69]

35. The record after 1974 shows not only extensive ascertainment efforts, it also shows an evident correlation between ascertained needs and problems and the nonentertainment programming broadcast during the sample weeks. *See supra* para. 18. Much of that effort was directed at the minority (black) community. *See id.*[70] Community witnesses testified as to KSOL's responsiveness prior to 1977, *see supra* para. 19; and although some of the testimony asserted that KSOL's responsiveness improved significantly after 1977, much of the testimony was positive about KSOL-FM prior thereto. *See id.* For what it reflects, the station's quantitative level of public affairs programming from 1974 to 1977 nearly doubled the level of the 1968-74 license periods. *See I.d.*, paras. 8, 10, 11, 12.

36. SMBC attacks the pre-1977 KSOL-FM record by initially claiming: "Quantitatively, its percent of non-entertainment program[s] was in each period below that in the 1977-1980 period."[71] It termed the public affairs programming during that earlier period "*de minimis.*"[72] It submits that the ALJ characterized KSOL's news at that time as "largely a 'rip and read' operation."[73] It accuses IRI of bloating the size of its 1974 news

[69] For that reason, we need not elaborately recite IRI's argument that "KSOL's performance must be considered all the more favorable when considered in light of the difficult financial conditions which faced the FM broadcast industry in the late 1960's and the first half of the 1970's." IRI Exceptions at 17. Nor need we rule on its exception to the ALJ's rejection of its financial forms for that period, evidence he accepted in the WOOK-FM case. *See id,* at n.17. We do note that the Commission has taken notice of "the general economic state of FM broadcasting in the recent past" and has stated that "it is apparent that we were less demanding on FM licensees during the [1972-1975] renewal period than presently is the case." *Simon Geller, supra,* 90 FCC 2d at 267. We so notice.

[70] SMBC submits that "IRI has failed to make a showing that Blacks are (or were) . . . underserved" in the market. SMBC Reply at 6-7. No such showing is required; all that need be shown is that the station ascertained community needs and problems and responded to some of them. *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 FCC 2d 650, 673 (1971). In presenting the views and ideas of black Americans, KSOL-FM was not estopped from relying on such sources as the National Black Network to help serve the needs of its community. *United Broadcasting Co. (KBAY-FM),* 93 FCC 2d 482, 498 (1983). Its selection of the NBN was a voluntary program choice, no less than any other, and clearly linked to its obvious desire to serve its minority audience by presenting a black perspective on news and information relevant to black communities, be it world affairs, economic analyses, civil rights, domestic politics, or — for that matter — the arts and sports.

[71] SMBC Reply at 3.

[72] *Id.*

[73] *Id.*, at 4 (*citing I.d.*, para. 56).

staff,[74] and it cites testimony of three former KSOL-FM employees as being either inconsistent with, or eroding, IRI's pre-1977 record.[75]

37. Even were we to accept SMBC's critique of the 1974-1977 performance at full strength, the record here is indicatively — to use a phrase referenced by the *Central Florida Enterprises* court[76] — "more than minimal." By that we mean, the programming evidence and witness testimony affirm that IRI did a good deal more than that required for routine renewal. It regularly reached out into its community, and brought that community into its programming choices and presentations. *See supra* paras. 18-19. It showed more than a mechanical "ascertain and program" pattern; it showed genuine interest in, and respect to, the community. *See id.* Were we certain that the sample material supplied here was authentically representative of the entire 1974-1977 license period, we would have little hesitancy about making a conclusive finding that that portion of the larger KSOL-FM record was "substantial."[77] Irrespective of label, the evidence relative to this period shows an ineluctable uptrend in the station's responsiveness to its community and a consistent bridge to the commendable levels of performance which followed in the next period.

38. The ALJ found that the 1977-1980 record of KSOL-FM was solid and favorable. We have condensed some of that record *supra,* paras. 20-21. SMBC's exceptions to the ALJ's finding that the later-period KSOL-FM record was "substantial,"[78] though somewhat eristic and subjective, appear to revolve around two central asseverations: (1) KSOL-FM's local newsgathering apparatus was not "extensive"[79]; and (2) that a portion of the station's "other nonentertainment" programming was pre-recorded

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[74] *Id.*

[75] *Id.*, at 5. *See also I.d.*, paras. 19-21.

[76] *See supra* note 64.

[77] Again, just as a *prima facie* indicator, nonentertainment programming during the May 1974 "composite week" generally outstripped the IRI proposals, to wit:

	Proposed	*Performed (May, 1974)*
News	5.06	7.36
Public Affairs	1.19	0.81
Other	1.19	2.60
Public Service Announcements	200	235 (composite week)

IRI Exceptions at 27 n.27. We have already summarized the qualitative composition of the performance in paras. 18 and 19, *supra.*

[78] As noted, Afro did not except to that particular finding. *See* Afro Exceptions ("Limited"). *But see supra* note 40 and *infra* paras. 40-41.

[79] *See* SMBC Exceptions at 4-7.

religious programming.[80] As to the first point, we might give SMBC's complaint more credence had the ALJ found that KSOL's local newsgathering efforts were "superior." He did not, nor do we. However, SMBC does not allege that KSOL's local newsgathering was unequal to radio coverage of stories of local interest or that any important local news stories were neglected, mishandled, or given short-shrift. It instead submits that one of KSOL's newsmen also prepared public affairs programming[81] and that two others were parttime.[82] Our own review of the record provides no persuasive basis for altering the ALJ's perception of the solid level of station performance, nor does it detract from the fact that the larger KSOL-FM record in the later period (of which local newsgathering is but one facet), was, at least, "substantial," that is, sound, favorable and substantially above the minimum requisite to renewal.

39. As to SMBC's attack on a portion of the station's "other nonentertainment" programming because of its religious music nature, we note the following. The 1960 *En Banc Programming Inquiry, supra,* specifically identified "religious programs" as one of the service categories deemed important. 44 FCC at 2314. It is obvious that KSOL's black-oriented format was intended to be particularly attractive to the black community,[83] and we need not here deliver a sociological tract on the rather special place the institution of religion holds in that community. Excluded from other mainstream institutions such as business, charitable, and country clubs, and — in certain places — political office, the black church became, in many ways, the black person's social club, community center, charitable hub, and even the political forum from whence, even today, many of its leaders come. Nor need we consult a treatise on cultural phenomena to appreciate the intimate kinship of gospel music to

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[80] *See id.,* at 8-10. It also argues that KSOL's later-term record should carry no comparative significance, in part, because it "occurred well after the filing on August 31, 1978 of a competing application for the WOOK(FM) facility." *Id.,* at 12. This contention trembles with desperation. It is one thing to disregard *KSOL's* record after 1980, when SMBC (and Afro) filed for the KSOL-FM license, so as to protect its challengers against a record upgraded as against *them;* it is irrational to disregard one station's record merely because a co-owned station, 3,000 miles away, was coincidentally challenged by someone else. Were we to accept SMBC's proposition, an existing station could have its entire contemporary record (however superlative) completely nullified for comparative purposes by some remote, collateral event. SMBC's ultrazealous reach will be turned away.

[81] *See id.,* at 5-6. It also contends that much local newsgathering and many local news interviews were done by telephone. *See id.,* at 4-5.

[82] *See id.,* at 5.

[83] The *En Banc Programming Inquiry* also identifies "service to minority groups" as an important service essential. 44 FCC at 2314.

the black religious experience.[84] It will suffice to credit such programming as properly designated "religion" to observe that the concept of a diversity of "ideas" in broadcasting goes to "esthetic, moral, and other ideas and experiences" as well as "political" and "social" ideas. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). That SMBC's concept of what is properly regarded as "religious programming" is apparently different is a matter of subjective judgment, and it is irrelevant.[85] The subject material is appropriately styled "religious programming."[86] All in all, over fifty local leaders voted KSOL-FM a vigorous ballot of support, *see I.d.*, para. 24, and a survey of KSOL-FM programming (for the later years) supplies the impetus for that vote. While some of the station's listeners were not yet satisfied, *see Designation Order*, paras. 2-9, the Commission has rejected those complaints, and we cannot gainsay the overwhelming satisfaction of the community. *Radio Station WABZ., supra*, 90 FCC 2d at 842.

40. *Alleged Misrepresentation.* Afro registers an exception to the ALJ's disinclination to designate a misrepresentation issue against IRI based on certain testimony of its news director, William Harrison, and the introduction of an exhibit (IRI Exh. 43) which differed somewhat on the amount of the news programming from the 1977-1980 program logs

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[84] Nor need we anthropologically probe the poignant ingredient of music in the "white" religious experience. *Psalms* 100 ("Serve the Lord with gladness: come before his presence with singing").

[85] SMBC makes the further claim that, in *Radio Station WABZ, Inc., supra*, "the Commission considered even non-musical religious programming *only* based on evidence that it was of substantial interest to listeners due to the religious nature of the area and not otherwise available." SMBC Exceptions at 9 (*citing to* para. 46. of *WABZ*) (emphasis added).

In his *I.d.* in the *WABZ* case, the ALJ did credit as nonentertainment a huge amount of religious programming. *See* 90 FCC 2d at 866 (para. 55). In reviewing that *I.d.*, the Commission also noted the station's religious emphasis and the station manager's testimony. *See id.*, at 841.

Assuming, *arguendo*, that the record here does not contain a similar vow by a station official that religion or (religious music) is important to KSOL's community, we find nothing in *WABZ* — or anywhere else — that suggests that religious programming is not routinely considered "nonentertainment" programming by the Commission. In fact, *WABZ* confirms this very point. SMBC's interpretation of that case is imaginary.

[86] *See* 47 CFR §73.1810(d)(1)(v), which states (emphasis added):

> (v) *Religious programs* (R) include sermons or devotionals; religious news; and *music*, drama and other types of programs designed primarily for religious purposes.

Contrary to SMBC, we make nothing of the fact that much of such programming was "pre-recorded." *See* SMBC Exceptions at 8-10. No case or policy holds that nonentertainment programming must be "live." Where programming is pre-recorded, the station's logs must merely so indicate. 47 CFR §73.1810(d)(2)(iii).

submitted by IRI.[87] Those differences are set out accurately by the ALJ. *I.d.*, paras. 14-17. When, during Harrison's cross-examination, these differences were pointed out, IRI requested a recess[88] and conceded the next day that its exhibit contained inaccuracies.[89] Afro filed a motion to enlarge issues shortly thereafter,[90] and — having been turned down — now seeks a demerit for IRI based on the foregoing incident or a remand to the ALJ to further explore the matter.[91]

41. We have examined the record, the ALJ's reasoning, and the briefs before us. Based thereon, we affirm the ALJ. Just as it did at hearing, IRI stipulates to the inaccuracies in its exhibit. However, as we have said before, "omissions or inconsistencies" unaccompanied by evidence of a "willingness to deceive" are not a cause for action. *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981). Misrepresentation is a serious charge which the Commission has equated with "perjury," *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973), and which the Board has suggested might lay cause for prosecution under 18 U.S.C. §1001. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1135-36 (Rev. Bd. 1982).[92] In this case, neither Afro nor SMBC dispute that they became aware of the inaccuracies in the exhibit through a comparison with the KSOL-FM logs previously supplied to them by IRI. Thus, there is much credibility to IRI's assertion that it "surely would not have attempted to deceive the Commission after placing in the hands of its competitors documentation setting forth the accurate facts."[93] As we have said in prior cases, when accurate information previously supplied by a party is a matter of open Commission record, "an intent to categorically misrepresent . . . is difficult to find." *Superior Broadcasting of California*, 94 FCC 2d 904, 909 (Rev. Bd. 1983) (*citing Vogel-Ellington Corp.*, 41 FCC 2d 1005, 1010

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[87] Afro Exceptions ("Limited") at 2-8; SMBC Exceptions at 14. The ALJ's reasons for not adding the issue are set forth in his ruling FCC 83M-1099, released April 6, 1983 (ALJ).

[88] Afro Exceptions ("Limited") at 3.

[89] *Id.*, at 4.

[90] *Id.*

[91] *Id.*, at 7-8.

[92] We recognize that, in reviewing *Fox River*, the Commission reserved judgment on whether the actionable elements of misrepresentation and 18 U.S.C. §1001 were coextensive. *See* 93 FCC 2d 127, 130 (1983). However, shortly after the Commission's review of *Fox River*, the court reviewed a Commission decision revoking a license for misrepresentation and pointedly referenced 18 U.S.C. §1001 (as well as 47 U.S.C. §312(a)). *Pass Word, Inc.* v. *FCC*, 673 F.2d 1363, 1364 n.2 (D.C. Cir.), *cert. denied*, 103 S. Ct. 89 (1982).

[93] IRI Reply at 21. IRI claimed that the differences were based on its reliance on its 1980 "composite week" to indicate its news efforts, *id.*, and that it had previously offered an amendment of its Exhibit 43, which amendment was rejected. The total amount of news for some days shown on the 1977-1980 logs differed from the 1980 "composite week," although neither were inaccurate. *See I.d.*, paras. 14-17.

(Rev. Bd. 1973)). Therefore, over and above the deference ordinarily accorded the presiding official in the conduct of a hearing, particularly an ALJ's factual findings,[94] our own review of the sequence of events and the surrounding circumstances negates the likelihood of willful intent to deceive. SMBC, which devotes less than one page to its exception on this ruling by the ALJ, may be closer to the mark when — in this connection — it states that "IRI's conduct must be characterized as at least gross negligence."[95] Perhaps, but it falls short of suggesting a concerted attempt to deceive the Commission on the amount of KSOL-FM news programming, already a matter of record evidenced by the station's actual logs submitted earlier by IRI.[96]

Standard Comparative Issue

42. Except for the denial of a "renewal expectancy" to IRI, the recitation of the comparative attributes of the applicants set forth in the *I.d.* and the analysis of their significance under the 1965 *Policy Statement, supra,* is generally accepted, affirmed, and incorporated by reference into our decision. In summary, both Afro and SMBC are each entitled to substantial preferences over IRI under our "diversification" criterion[97]; and since neither of the preferred applicants (or their principals) is charged with any other medium of mass communications,[98] they are equal to each other. The ALJ found both Afro and SMBC to be quantitatively equivalent under the fulltime "integration" criterion (i.e., Afro, 8.16% v. SMBC, 10%),[99] but he awarded Afro a "moderate" preference under this category because Afro's "sole proposed [fulltime] integrated stockholder has lived in the Bay area, now lives there, and intends to stay."[100] He also found that SMBC had a "moderate" parttime

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[94] *See generally Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

[95] SMBC Exceptions at 14. Actually, SMBC does not argue that IRI's exhibit is a misrepresentation, but that the ALJ's finding that the inconsistencies were the result of "improper supervision" (of Mr. Harrison) should lead us to question IRI's "reliability" because — in view of United's history — it demonstrates "a pattern of carelessness or inattentiveness." *Id.* This exception strikes us as a post-hearing request for an "ineptitude" issue, *see George E. Cameron, Jr. Communications, supra,* 91 FCC 2d at 881, and will be denied.

[96] Finally, while Afro insists that we could take action on IRI's alleged misrepresentation without holding a hearing on this issue, Afro Exceptions ("Limited") at 8, we believe that course of action would be dubious. *West Coast Media, Inc.* v. *FCC,* 695 F.2d 617, 620 (D.C. Cir. 1982) (intent to deceive "should not be discussed by the Commission in the absence of a designated misrepresentation issue").

[97] *See I.d.,* para. 60. (The ALJ did not characterize the challengers' "diversification" preferences).

[98] *I.d.,* para. 47.

[99] *Id.,* para. 66.

[100] *Id.* That 8.16% Afro stockholder also has broadcast experience. *Id.,* para. 46.

integration preference (*i.e.*, SMBC, 90% v. Afro, 61%).[101] The "integration" proposals of both of these applicants were enhanced because of black ownership.[102] SMBC also received credit for proposing auxiliary power.[103]

43. The only exceptions directed to the findings of fact and conclusions of law relating to the conventional comparative criteria are: (1) SMBC's challenge to the award of integration credit to Errol G. Chisom (8.16%), Afro's only fulltime integrated principal,[104] and to Stanley P. Hebert (30.61%), who proposed a parttime role[105]; and (2) Afro's challenge to the award of parttime integration credit for SMBC's Dr. Arthur W. Mayo (90%). SMBC claims that, under *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), Chisom's interest in Afro "is a mere facade interposed solely to gain integration credit without the essential attributes of actual ownership . . . ."[106] It further contends that Hebert's role is "nonmanagerial," and therefore not entitled to credit.[107] Afro defends the *I.d.* and the integration credit[108]; it countercharges that SMBC's Dr. Mayo is too busy with his McDonald's restaurant franchise, that he would not here commit himself to be present at specific periods, and that he admitted he would have no day-to-day involvement.[109]

44. Although the mutual attacks on the magnitude of the challengers' respective integration credits are not frivolous, our ultimate determination to grant the KSOL-FM renewal moots these exceptions and we need not resolve them.[110] Irrespective of the merits of these particular exceptions, neither Afro nor SMBC prevail over IRI, whose entitlement to a "renewal expectancy" and a license renewal is factored into the ultimate comparative reckoning in the next paragraphs below.

Conclusion

45. For all the difficulties and ambiguities rife in the "comparative renewal" system, and without intending to oversimplify, the court has chiseled a clear-cut principium to be inferred from the kinetics of our statutory schema:

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[101] *Id*, para. 67.

[102] *Id.*, para. 61.

[103] *Id.*, para. 68.

[104] SMBC Exceptions at 16-19. Chisom paid only $100 for his interest in Afro (Tr. 962-964) and asserted that he need not pay more if Afro is unsuccessful (Tr. 96, 1186-1187).

[105] *Id.*, at 21.

[106] *Id.*, at 18.

[107] *Id.*, at 21.

[108] Afro Reply at 21-24. Hebert, a lawyer, would be the station's "legal affairs director" (*id.*, at 24), and he says he'll produce a public affairs program (id. at *22*).

[109] Afro Exceptions ("Limited") at 8-12.

[110] *Lex non praecipit inutilia, quia inutilis labor stultus.*

> The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

Central Florida Enterprises, Inc. v. *FCC*, 598 F.2d 37, 61-62 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). While the ALJ and the Board have endeavored to accurately denominate the incumbent's performance level with one of the short-hand tags that have come to inform the chronicles of "comparative renewal" law, nowhere does the *I.d.* suggest that the level of KSOL-FM performance is "substandard." Even IRI's antagonists who, in varying degrees, challenge the ALJ's descriptive labels, do not claim a "substandard" record.[111] Moreover, neither the ALJ nor IRI's challengers assert that KSOL's record is to be at all likened to that appearing in *Simon Geller, supra*, where no "renewal expectancy" was awarded because there was *"no"* effort made to ascertain, or respond to, community needs,[112] nor do they assert that KSOL-FM cavalierly ignored the needs, problems and interests of its community; all that is really at issue in this connection is the proper label for IRI's "level of effort" during *seriatim* license periods. And yet, despite the fact that the *Simon Geller* record revealed essentially *"no"* effort to comply with the Commission's bedrock public service requirements, the Commission found, in effect, that the incumbent did "minimally" qualify for regular renewal. *See* 90 FCC 2d at 267. While the paper record of KSOL's performance is lean in the earlier license terms, even the representative sample that is shown makes it indisputably plain that KSOL's pre-1977 record is many levels above that found "minimally" warranting renewal in *Simon Geller. See I.d.*, paras. 8-10; *supra* paras. 13-19.

46. We do agree with the ALJ that KSOL's record during the 1977-1980 period was, at the very least, "substantial" as that term has been defined by the Commission.[113] IRI there demonstrated an abundance of programming responsive to the needs of *its* audience, it has won the

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[111] Even KSOL's early record does not appear "substandard" for an FM station operating at that time. Until the audiophile revolution and FM stereophonic broadcasting suffused the entire nation, FM was to commercial radio broadcasting much as UHF TV was to commercial television: a very poor stepsister. *See, e.g., Simon Geller, supra*, 90 FCC 2d at 267; *supra* note 69. Many FM stations merely duplicated the programming of a "sister" AM station. *See, e.g., Victor Broadcasting, supra.*

[112] The Commission found that:

> Geller broadcast *no* news, *no* editorials, and *none* of his programming was locally produced. *None* of his programs, moreover, were presented in response to ascertained community needs and problems.

90 FCC 2d at 265 (emphasis added).

[113] " '[S]ubstantial,' *i.e.*, 'sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.' " *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1006 (1981), *aff'd sub nom, Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983).

approbation of a legion of community leaders and involved citizens, and its record is free of even the slightest violation of FCC rules or policies. It has even done more: it has reached out beyond the station into its community with offers of station help and support. *See, e.g., I.d.*, paras. 23-29; *supra* paras. 19, 32. And, it has delivered. *See, e.g., I.d.*, paras. 24, 41. Nobody, not the ALJ or the challengers, contends that KSOL's ascertainment was not thorough or that its service response was not attuned thereto. Other than increasing the *quantitative* level of effort, there is little more KSOL-FM could have been reasonably called upon to do.[114] In key qualitative aspects, it has done what the Commission has asked of conscientious licensees.

47. Where the Board has felt that the record of an incumbent licensee has not merited a "renewal expectancy," it has not hesitated in the slightest to say so. *See United Broadcasting (WOOK-FM), supra; George E. Cameron, Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789, 794-796 (1983).[115] It has awarded the license to a challenger. By the same token, a licensee with an immaculate, fourteen-year record[116] that has shown a steady improvement curve

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[114] Actually, if station performance *were* measured on a strictly *quantitative* scale, and based on the composite week showings for the 1980 renewal application batch, we would be constrained to consider KSOL's performance to be trending toward the "superior." For the ALJ found that compared to other local stations, KSOL would rank:

> 5th among the FM stations for total number of minutes of nonentertainment programming; 7th among FM stations for percentage of time spent on nonentertainment programming; 6th among FM stations in total minutes of public affairs and other nonentertainment programming and 7th in terms of percentage of broadcast time; 24th among 61 AM and FM stations in total minutes of news programming and 28th in percentage of broadcast time; 15th among 61 AM and FM stations in total minutes of public affairs and other programming and 20th in percentage of broadcast time.

I.d., para. 40 (cite omitted). As we have commented, however, raw "numbers" are the beginning of the story — not the end.

[115] Nor has it been diffident in disqualifying incumbent licensees in a noncomparative setting. *See, e.g., West Jersey Broadcasting*, 90 FCC 2d 363 (Rev. Bd. 1982). Or slapping a deficient licensee with less than a regular renewal. *Gross Telecasting, Inc.*, 92 FCC 2d 204 (Rev. Bd. 1982).

[116] As indicated, the license of KSOL-FM has not been renewed since 1968. In a not-too-distant licensing case, the court noted that the licensee had waited 13 years for a definitive FCC judgment of its standing, and the court said:

> We do, however, suggest that the Commission, in deciding on the sanctions to be imposed on appellants, consider whether those sanctions should not be eased in some way because of the extraordinarily long period of doubt to which appellants have already been subjected.

Millar v. *FCC*, 707 F.2d 1530, 1544 n.18 (D.C. Cir. 1983). In making a judgment on IRI's "comparative renewal" standing, we have not — with all due respect to the court —

paralleling the maturation of FM broadcasting should not be deprived of a legitimate "renewal expectancy" without just cause. We know not whether KSOL's progressive record was induced by the inherent "competitive spur" of the Communications Act, and we need not speculate on whether the sibilant rush of the axe descending on distant United stations spooked IRI into an increasingly swifter gait.[117] It is sufficient to view IRI's record in the objective, whereupon we find that KSOL's overall performance, with due regard to the most recent (pre-"challenge" period[118]), does surely warrant — at a conservative modicum — the "renewal expectancy" anticipated by statute. We cannot here find, as the Commission implicitly did in *Simon Geller* where essentially "*no*" effort was made, that "[t]he total [IRI] record is a minimal one," *I.d.*, at para. 59, or just barely justifying renewal.[119] But, as the law instructs, the "renewal expectancy" that we restore to IRI is simply "a comparative preference weighed against other factors." *Cowles Broadcasting*, 86 FCC 2d at 1012. It does not resolve the ultimate comparative contest.

48. IRI's "renewal expectancy" and its comparative preference must be weighed against the so-called "structural" indicia afforded comparative credit under the 1965 *Policy Statement, supra*, particularly those of "diversification" of the media and "integration" of ownership with management. *Central Florida Enterprises, supra.* Neither Afro nor SMBC own other media of mass communications, nor do its principals. *I.d.*, para. 60. Their respective preferences under the "diversification" criterion are patent. On the other hand, neither Afro nor SMBC offers much, relatively speaking, in the way of fulltime integration of ownership with management: the ALJ credited Afro with a 8.16% factor, *id.*, at para.

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considered the delay factor. We have, however, previously recognized the difficulty that IRI might have had in finding evidence of, and witnesses who remember, radio programming presented many years ago, *Intercontinental Radio, Inc.*, 90 FCC 2d 935 (Rev. Bd. 1982), and our placement of a higher predictive value on more recent performance may help offset the fact that a hearing on KSOL's renewability came 12 years after deferral.

[117] Even if the loss of other United licensees was, in part, a positive incentive to IRI's good performance, that would be fine. *See generally Faulkner Radio, supra* note 15, where the Commission held that it would consider whether the loss of one (or more) of a corporate multistation owner's licenses would have a salutary "deterrent effect." 88 FCC 2d at 616.

[118] While we have rejected IRI's contention that our purview is exclusively limited to the most recent record period (*see supra* paras. 8-12), we nonetheless acknowledge that the decision in *Cowles Broadcasting, supra,* spoke of the "substantial service Cowles rendered to the public during the *last* license period." 62 FCC 2d at 958 (emphasis added).

[119] In fairness to the ALJ, his different conclusion as to the strength of IRI's overall record contained a significant downgrading based on the performances of WOOK-AM and WFAB. *See I.d.*, paras. 58, 59; *supra* paras. 5-7.

62, and SMBC with a corresponding 10%. *Id.*, at a para 63. While both proposed additional parttime integration, *id.*, at paras. 64-65, the credit awarded by the Commission for parttime integration is not great. *Policy Statement, supra,* 1 FCC 2d at 395 ("[t]o the extent that the time spent moves away from full time, the [integration] credit given will drop sharply. . . ."). The minority ownership of Afro and SMBC is an "enhancement" to the integration level, and is weighted in direct proportion to ownership integration into management. *West Michigan Broadcasting Co.* v. *FCC,* No. 82-2513 (D.C. Cir. May 25, 1984), slip op. at 11-13 (minority ownership, if accompanied by owner participation in station affairs, is to be treated as a qualitative enhancement under the integration of ownership with management criterion). Hence, the minority ownership enhancement of the challengers' integration preference is not comparatively strong.[120] Nonetheless, both Afro and SMBC are surely not "nothing" challengers, *see Fidelity Television Inc.* v. *FCC,* 515 F.2d 684, 705 (D.C. Cir.), *cert. denied,* 423 U.S. 926 (1975), and — were this a contest for a new frequency — both would be preferred *a priori* over IRI, especially under the "diversity" criterion which the *Policy Statement* terms "a factor of primary significance." 1 FCC 2d at 394.[121]

49. In comparing all three of the applications before us, it is helpful (and necessary) to consider *Cowles Broadcasting, supra,* as a precedential touchstone. There also, the Commission considered an incumbent whose broadcast record could not be labeled "superior" or "exceptional," 86 FCC 2d at 1007 (para. 46), but was found to be "more than 'minimal'." *Id.* Cowles' challenger was, as are the challengers at bar, superior on the

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[120] *Compare Waters Broadcasting Corp.,* 91 FCC 2d 1260 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC, supra* (100%, fulltime integrated black ownership entitled to significant enhancement value). Because the challengers' minority enhancements for ownership integration are not weighty, we need not determine whether IRI, through its record showing of extraordinary sensitivity to the viewpoints of the minority community, has overcome the challengers' minority enhancements. *See, TV 9, Inc.* v. *FCC, 495 F.2d 941 (D.C. Cir. 1974) (supplemental opinion; en banc),* wherein the court suggested that favorable comparative consideration of minority ownership could be offset by the nonminority applicant through a showing of responsiveness to minority viewpoints.

[121] We recognize, obviously, that the "structural" indicia of the *Policy Statement* are not failsafe auguries of satisfactory future performance, for the Commission's archives are textured with the fossils of many integrated, non-multistation licensees now extinct. *See, e.g., West Jersey Broadcasting, supra* note 115; *Berlin Communications, Inc.,* 68 FCC 2d 923 (1978), *aff'd* 626 F.2d 869 (D.C. Cir. 1979); *Bluegrass Broadcasting Co.,* 43 FCC 2d 990 (1973). Even Simon Geller, the quintessential integrated owner with no other media interests, now barely clings to the tendrils of his license, and that only by the court's good grace. *Committee For Community Access* v. *FCC, supra.* On the other hand, "structural" indicia may not be simply ignored in a "comparative renewal" contest. *Central Florida Enterprises, Inc.,* 683 F.2d at 509, & n.31; *Committee For Community Access* v. *FCC, supra.*

structural criteria of "diversification" and "integration." 86 FCC 2d at 1017.[122] The Commission then weighed Cowles' record against its challenger's structural superiority and held:

> Thus, the Commission considers it most reasonable to give Central's diversification and integration advantages lesser weight as compared to Cowles' preference based on substantial service. If these were the only factors involved in the comparison, Cowles, in our view, would be an easy winner.

86 FCC 2d at 1017. But, the Commission then downgraded Cowles for a violation of our important "main studio" rule, and stated:

> . . . because the incumbent here has committed broadcast related misconduct, we recognize that this is a close and difficult case.

Id., at 1018.[123] In the final balancing, however, Cowles' license was renewed over the challenger. *Id.*

50. IRI's record at KSOL-FM is marred by no violation similar to that for which Cowles was assigned a comparative demerit; here, there is no regulatory violation at all for the entire fourteen years under examination. And, like Cowles, the IRI record is throughout "more than minimal." In the latest (pre-"challenge") license period, the record is excellent in terms of KSOL's responsiveness to its community; many listeners, in fact, considered it exceptional. *See I.D.*, paras. 23-24 (and evidence cited therein). We see nothing in the record that would cause us to disagree with those witnesses. Had IRI made a more complete showing of its record in the earliest license periods, IRI might also be an "easy winner" by the policy tenets outlined in *Cowles Broadcasting*. The Commission there stated:

> We have concluded that only by giving a substantially performing incumbent, such as Cowles, a strong preference, can the public be protected from the risks of arbitrarily destroying a proven and acceptable service. We have also concluded that, in light of these risks, structural factors such as integration and diversification have relatively less weight in the comparative renewal context.

86 FCC 2d at 1017-18. Though IRI's evidentiary problems in connection with its earlier license term showings have brought its current challengers closer, we nevertheless find no provocation in the record or the law for "destroying a proven and acceptable service" such as that provided by KSOL-FM. For:

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[122] The fulltime integration level of the *Cowles Broadcasting* challenger was 10.5%. 86 FCC 2d at 1009; other principals therein proposed parttime integration. *Id.*, at 1009-1010. *Compare id., with* Afro's fulltime integration here (8.16%) and SMBC's (10%), and their respective parttime proposals.

[123] Somewhat like IRI, Cowles' parent corporation had prior scrapes with the law: it had pleaded *nolo contendere* to 50 counts of mail fraud. 86 FCC 2d at 997. IRI's parent — United — was deemed culpable for WOOK-AM's perceived broadcast of lottery information and misleading advertising. *United Television, supra,* 55 FCC 2d at 417-419; *id.*, at 423-424. In affirming the Commission in that case, the court did not reach those perceived violations (*see* 565 F.2d 699 (D.C. Cir. 1977)).

> The final justification for the renewal expectancy is the avoidance of haphazard industry restructuring. That is, the public interest is advanced if there is no rapid turnover of licensees. In the instant case, [the challenger] points to no evidence that weakens this rationale.

Victor Broadcasting, supra, 722 F.2d at 764. Nor do the challengers here. Whereas the "comparative renewal" function of the Communications Act is regarded as a "competitive spur," nothing in that Act or in the case law calls for the feral whipping of a station that, in good-faith, has satisfied its myriad public interest obligations in the precise manner prescribed by the Commission, and the potential that the instant challengers *might* provide service as good (or possibly better) is an insufficient reason to mandate that IRI forthwith forfeit its valuable license over to a new applicant wholly untested in the marketplace of public and governmental demands.[124] IRI has demonstrably satisfied both demands and, by its diligent labors, fairly earned renewal of its unblemished license.

51. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed January 30 and June 12, 1984 by Intercontinental Radio, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and

52. IT IS FURTHER ORDERED, That the motion to strike filed April 2, 1984 by San Mateo Broadcasting Company, Inc. IS GRANTED, and paragraphs 8-11 of the reply filed March 28, 1984 by the Chief, Mass Media Bureau ARE STRICKEN; and that the motion for acceptance of joint response filed May 23, 1984 by Afro-American Communications and San Mateo Broadcasting Company, Inc. IS DENIED, and the joint response IS DISMISSED; and

53. IT IS FURTHER ORDERED, That the motion for leave to withdraw emergency motion filed May 4, 1984 by Afro-American Communications IS GRANTED, and the emergency motion to postpone filed May 3, 1984 IS WITHDRAWN; and

54. IT IS FURTHER ORDERED, That the request for official notice of record facts filed May 16, 1984 by Intercontinental Radio, Inc. IS GRANTED, and the memorandum of record facts IS ACCEPTED; and

55. IT IS FURTHER ORDERED, That the application of Intercontinental Radio, Inc. (File No. BRH-800801WG) for renewal of license of Station KSOL(FM), San Mateo, California IS GRANTED, and the applications of Afro-American Communications (File No. BPH-801103AL) and

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[124] As the *Victor Broadcasting* court observed:

> As with all proposals, uncertainty exists as to whether the promises of future behavior will be kept.

722 F.2d at 763. *See also id.* at n.** ("a challenger could . . . fall short of its proposal").

San Mateo Broadcasting Company, Inc. (File No. BPH-801027AI) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Separate Statement of Board Chairman Marino

This is not the only case complicated by undue delay, usually prior to designation for hearing. *See e.g., United Broadcasting*, 94 FCC 2d 938 (Rev. Bd. 1983); *George E. Cameron, Jr.*, 91 FCC 2d 870 (Rev. Bd. 1982); *Broadcast Communications, Inc.*, 93 FCC 2d 1162 (Rev. Bd. 1983); *KTVO, Inc.*, 54 RR 2d 1456 (Rev. Bd. 1983); *Baker Protective Services, Inc.*, 55 RR 2d 1584 (Rev. Bd. 1984). Here renewal of the license of Station KSOL(FM) was deferred for nearly a decade even though the station had a spotless broadcast record. In response to an inquiry at oral argument the Bureau indicated that the practice of deferring license renewal for extended periods of time has apparently been abandoned. See Decision footnotes 27 and 116.

A ten-year delay in adjudicating any case or controversy places great strains on all concerned. Here the unfairness was largely felt by the renewal applicant since the competing applications were not filed until late in 1980. In *Hush-A-Phone* v. *FCC*, 238 F.2d 266, 269 n.9 (D.C. Cir. 1956), the Court warned about the unfairness which results "when the Commission's adjudicatory process bogs down." (Less than 7 year delay). That warning has been repeated in numerous other cases. *See e.g., Lebanon Valley Radio, Inc.* v. *FCC*, 503 F.2d 196, 201 (D.C. 1974) ("proceed expeditiously so that this proceeding may reach a final conclusion before it enters its second decade"); *Millar* v. *FCC*, 707 F.2d 1530, 1544 n.18 (D.C. Cir. 1983) ("17½ years since the underlying conduct took place"). See also footnote 1 below.

Over the past three years Chairman Fowler and the Commission have adopted and implemented the MBO objective of providing "service to the public in the most efficient, expeditious manner possible." Hopefully, the resulting efforts at all levels of the administrative process, both before and after designation for hearing, will eliminate the type of delay reflected in this and other cases. Every Chairman from Mr. Fowler in the 1980s back to Mr. Ford in the 1960s has worked hard to speed up FCC decision making. See *e.g.*, Chairman Wiley's *Adjudicatory Re-Regulation*, 58 FCC 2d 865 (1976). And Congress beginning in 1952 has acted to streamline FCC procedures on numerous occasions. Thus, we should not delude ourselves into believing that "lottery" legislation in the 1980s will be any more successful in expediting the administrative process than was the "Review Board" legislation in the 1960s. See Sen. Rep. No. 576, 87th

Cong. 1st Sess. (1961). Nor will a greater reliance on market forces make the task easier. For example, past experience with the mobile telephone (cellular) industry, which was first opened to competitive forces in the late 1940s, seems to indicate that such forces generate more "incomplete" applications, "frivolous" petitions to deny, and citizen complaints.

The law's delay has been with us since at least Prince Hamlet's time. History, with a chuckle, reminds us that administrative agencies were created in part because it was felt that justice in the courts was being denied by delay. By the time Congress passed the Administrative Procedure Act in 1946, the reviewing courts were authorized to "compel agency action unlawfully withheld or unreasonably delayed."[1] Thus, when we start working on a broadcast or common carrier matter we should assume that time is of the essence. A poor citizen, a small businessman, often the largest corporation in the world is waiting for an answer to a plea for relief. "HURRY UP PLEASE ITS TIME." As a small agency we may not have enough of the world's resources and an eternity of time, but we do have "world enough and time" if we remember the people's plea: "HURRY UP PLEASE ITS TIME."

[1] *See Nader* v. *FCC*, 520 F.2d 182, 205-207 (D.C. Cir. 1975), and *MCI* v. *FCC* 627 F.2d 322, 343 (D.C. Cir. 1980). Compare *MCI Cellular Telephone Co.* v. *FCC*, D.C. Cir. No. 83-1408, June 29, 1984, Slip Op. p. 13, "cellular technology has been available for introduction into the marketplace [by AT&T] for over a decade," with Judge Richey's belief that "every action complained of in this case could have or should have been handled by the appropriate regulatory bodies, which responsibility the regulators miserably mishandled or failed to handle." *Southern Pacific Communications* v. *American Telephone and Telegraph Co.*, D.C. Cir. No. 83-1102, June 26, 1984, Slip Op. p. 14 n. 7, see also *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974).

FCC 83D-70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Intercontinental Radio, Inc.	BC Docket No. 81-890 File No. BRH-800801WG
For Renewal of License of Station KSOL(FM), San Mateo, California	
Afro-American Communications San Mateo, California	BC Docket No. 81-891 File No. BPH-801103AL
San Mateo Broadcasting Company, Inc. San Mateo, California	BC Docket No. 81-892 File No. BPH-801027AI
For Construction Permits	

Appearances

Thomas Schattenfield, Vonya B. McCann, and *David Tillotson* on behalf of Intercontinental Radio, Inc.; *Lawrence J. Bernard, Jr.* on behalf of Afro-American Communications; *Lewis I. Cohen, Roy W. Boyce,* and *Morton L. Berfield* on behalf of San Mateo Broadcasting Company, Inc.; and *Charles Dziedzic, Daniel Sarno,* and *Stephen Yelverton* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

Issued December 22, 1983; Released December 28, 1983

Preliminary Statement

1. The Commission released Memorandum Opinion and Order, 83 FCC 2d 819, on December 21, 1980, designating for hearing the application of Intercontinental Radio, Inc. (Intercontinental) for renewal of its license

for station KSOL(FM) at San Mateo, California, which was filed on August 1, 1980,[1] and the applications of San Mateo Broadcasting Company, Inc. (San Mateo), and Afro-American Communications (Afro-American) for construction permits for a new FM station in San Mateo filed on October 27, 1980 and November 3, 1980, respectively. Since all the applications propose the use of the frequency 107.7 MHz they are mutually exclusive.

2. The issues designated were:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.[2]

3. A prehearing conference was held on February 17, 1982 and hearing sessions and further conferences were held in Redwood City, California and Washington, D.C., on various dates in June, July, and August of 1982. Proposed findings and conclusions were filed in three phases and the final phase was filed on March 10, 1983. The record was closed by order released December 9, 1983.

Findings of Fact

Intercontinental and KSOL

4. The station now called KSOL was licensed to Intercontinental sometime prior to April 26, 1967.[3] On June 26, 1967 Intercontinental became wholly owned by United Broadcasting Company, Inc. (United). The record is not clear as to whether United acquired control of Intercontinental directly or through Tele-Broadcasters, Inc. which is about 92% owned by United and about 8% owned by some 50 other stockholders. At any rate, Intercontinental is now owned by Tele-Broadcasters, Inc. (Intercontinental Ex. 42, p. 1). Until he died on June 1, 1981, Richard Eaton was president, treasurer, director, and sole stockholder of United. Mr. Eaton's will was probated on June 8, 1981 and the United stock is presently held by Suburban Bank of Montgomery County, Maryland, which holds the stock as personal representative of Mr. Eaton's estate (Intercontinental Ex. 42, p. 13, amendment filed March 1, 1983). Mr. Eaton's surviving spouse has filed with the probate court her renunciation

[1] Intercontinental also filed renewal applications in 1971, 1974, and 1977; action on these was deferred by the Commission until it issued the designation order cited here.

[2] The designation order also directed the Administrative Law Judge to determine whether issues should be added to consider the significance of the findings in *United Broadcasting Company, Inc., [WOOK(FM)]* on Intercontinental's qualifications. That no issue need be added was determined in a Memorandum Opinion and Order released November 4, 1983 (FCC 83M-4044). The WOOK(FM) initial decision is FCC 82D-73; the Review Board decision is FCC 83R-55.

[3] Until September 1972 the station had the call sign KVEZ(FM).

of the provisions of Mr. Eaton's will and an election to take the share she would have taken had he died intestate. The matter has not been resolved by the court. If the provisions of the will prevail against Mrs. Eaton's renunciation, 293 shares of United's issued stock will go into the residue of the estate, which will not be distributed until after the death of Marguerite Georgette Eaton who is Mr. Eaton's former wife, and then will be distributed among Eaton family members with three bequests of 16% each, eight bequests of 4% each, seven bequests of 2% each, one bequest of 3%; and to Gerald Hroblak a 3% share. The remaining 18 issued shares will go 9 to Gerald Hroblak and 3 each to Joseph Schweighardt, William Parris, and Samuel Phillips, Sr. (Intercontinental Ex. 42, pp. 2-6).

5. Just before Richard Eaton's death, the directors of Intercontinental were Richard Eaton, Daniel Richard Eaton (Richard Eaton's son), Elsa Eaton (Richard Eaton's wife), Pierre Daniel Eaton (Richard Eaton's son), Gerald Joseph Hroblak (second in command to Richard Eaton in the United operation), and Joseph George Schweighardt, Jr. (general manager of an United operation in New York) (Intercontinental Exs. 29, 30, 31, 32, 35, 41). None of those persons, save, perhaps, Richard Eaton, about whom the record is silent in this respect, had any relationship with the day-to-day operations of KSOL except for Hroblak who has taken an active role in KSOL's operations since late 1975 or early 1976 (Intercontinental Ex. 35, p. 3). Following Richard Eaton's death, William B. Parris, an United employee, and Neil E. Johnson, a Suburban Bank trust officer, were made directors of Intercontinental (Intercontinental Ex. 42, p. 6).[4] Richard Eaton was an officer of Intercontinental (his title is not shown) before his death, Martha Stewart Byers (an United bookkeeper) was assistant secretary (Intercontinental Ex. 29), and the other officers are not shown. Subsequent to Richard Eaton's death, Gerald J. Hroblak was named president and treasurer, Gary L. Gross was named vice president, William B. Parris was named vice president/secretary, and Martha Stewart Byers continued in her capacity as assistant secretary (Intercontinental Ex. 42, p. 6). Gross resigned as an officer of Intercontinental as of December 31, 1982 (amendment filed June 28, 1983).

6. Intercontinental's parent corporation, United, owns or controls subsidiaries which own WOOK(FM), Washington, D. C.; WSID(AM) and WYST(FM), Baltimore, Maryland; WBNX(AM), New York, New York; WINX(AM), Rockville, Maryland; KALI(AM), San Gabriel, California; and WJMO(AM) and WLYT(FM), Cleveland Heights, Ohio (San Mateo Ex.

[4] Part of page 6 and a part of page 7 were excluded when Exhibit 42 was received (see Transcript 154-156). That ruling was erroneous and all of the material excluded on pages 6 and 7 of that exhibit is received.

20).[5]

KSOL Past Broadcast Record

7. KSOL's 1968-1977 broadcast record must mostly be drawn from its renewal applications. The 1971 renewal application advised that the program format for the past 12 months had featured programs of interest to the Spanish-speaking communities and in foreign languages including 105 hours in Spanish, 25 hours in Portuguese, 3 hours in Italian, 5 hours in Japanese, and 2 hours in Irish (San Mateo Ex. 9, pp. 9-10).

8. The 1971 renewal application showed programming as follows during the 1968-1971 composite week:

	Hours	*Minutes*	*Percent*
News	7	0	5.00
Public Affairs	1	3	.75
Other	2	52	2.04

There were 220 PSAs broadcast (San Mateo Ex. 9, pp. 9-10). The only news staff shown was a news director (San Mateo Ex. 9, p. 45). The station relied on a wire service for local, state, national, and international news; on papers and magazines for lighter news; and on bulletins from various sources. About 25% of news program time was directed to local and regional news (San Mateo Ex. 9, p. 43).

9. An amendment filed October 10, 1972 advised that the format had changed to Black programming (San Mateo Ex. 15).

10. The 1974 renewal application reflected composite week programming as follows:

	Hours	*Minutes*	*Percent*
News	9	10	5.45
Public Affairs	0	28	.27
Other	1	31	.89

There were 235 PSAs broadcast (San Mateo Ex. 8, pp. 8-9). KSOL provided a Black format and subscribed to the National Black Network as well as the Associated Press. It had two persons who gathered local and regional news and devoted 30% of its news program time to local and regional stories (San Mateo Ex. 8, p. 32). The application also noted that the composite week did not truly reflect KSOL's performance because of the format change and showed the following performance for the month of May 1974 (San Mateo Ex. 8, p. 30):

[5] Two other stations were owned by United prior to July 22, 1981 and are shown in San Mateo Ex. 20. These were transferred on that date in BALCT-810406KE and BAPCT-810330KG of which official notice is taken.

	Hours	*Minutes*	*Percent*
News	54	5	7.36
Public Affairs	6	3	.81
Other	19	0	2.6

11. The 1977 renewal application reflected for the 1974-1977 composite week:

	Hours	*Minutes*	*Percent*
News	9	23	5.8
Public Affairs	2	5	1.3
Other	5	20	3.3

There were 367 PSAs broadcast (San Mateo Ex. 17, p. 7).

12. The 1980 renewal application reflected for the 1977-1980 composite week:

	Hours	*Minutes*	*Percent*
News	8	28.5	5.04
Public Affairs	2	31	1.49
Other	8	38	5.13

There were 242 PSAs broadcast (San Mateo Ex. 21, p. 7).

13. Intercontinental's evidence indicates that since 1977 the news department has consisted of a news director and two full-time and two part-time staff persons. This staff covers local news events in the Bay Area and has developed contacts in the various governmental offices therein. In addition to live news coverage, the station makes telephone contacts with various news sources (i.e., police departments) to develop stories. News sources frequently call in information. Many taped interviews are utilized in the programming: 5,500 in 1978, 6,500 in 1979, and 7,200 in 1980. The station has continued to utilize the AP wire and that of National Black Network. Special programs, such as an interview with then President Carter, tributes to Martin Luther King, interviews with various persons in the news, and live coverage of various political events are broadcast (Intercontinental Ex. 43, pp. 1-16). Some of these appear to be public affairs rather than news programming.

14. Intercontinental describes its news scheduling for the 1977-1980 period as follows (Intercontinental Ex. 43, p. 7):

> *Monday through Saturday (6:00 a.m. to 7:00 p.m.):*
>
> Five minutes of news is broadcast live each hour at ten minutes before the hour; except that at 7:50 a.m. and 5:50 p.m., nine minutes of news is broadcast live.
>
> *At 8:50 p.m. and 11:50 p.m. and 12:50 a.m.*, five-minute news reports are broadcast and that time includes commercials or public service announcements.

From 1:50 a.m. to 6:00 a.m., news is broadcast hourly at fifty minutes past the hour (i.e., at 1:50 a.m. hourly until 6:50 a.m.).

Sunday:

From 12:00 a.m. to 6:00 p.m., five minutes of news from the National Black Network is broadcast at fifty minutes past the hour.

Except for a movement of newscasts from 15 to 50 minutes past the hour at some point, this schedule was said by an Intercontinental witness to have existed from September of 1977 through October 1980 (Tr. 884-889). The witness further said that each of the Monday through Friday hourly broadcasts contained 5 minutes of news while the network newscasts were 5 minutes in length but included only 3 ½ minutes of news (Tr. 893-894).

15. KSOL logs offered by Afro-American reflect some differences. On Thursday, September 29, 1977, only three local newscasts were broadcast and each had only 3 ½ minutes of news (Afro-American Ex. 9). On Saturday, January 7, 1978, one locally produced newscast was broadcast; it contained 3½ minutes of news. All other newscasts that day were produced elsewhere (Afro-American Ex. 11; Tr. 899-900).

16. Program logs for Monday, March 20, 1978, Tuesday, May 16, 1978, and Wednesday, April 5, 1978, show that on those dates the station broadcast 3½ minutes of locally produced news at 6:15 p.m. and 7:15 a.m. and at 15 minutes past each hour from 9:15 a.m. through 8:15 p.m. There were 3½ minutes of network news broadcast at 15 minutes past the hour during all other hours except 8:00-9:00 a.m., when no news was broadcast (Afro-American Exs. 6, 7, 8).

17. Twelve local news programs were broadcast on Saturday, March 24, 1979 at 12:54 a.m. and 4:54 a.m., hourly at 50 minutes past the hour from 9:50 a.m. through 5:50 p.m., and at 11:50 p.m. No local newscasts were broadcast between 5:00 a.m. and 9:50 a.m. All of the local newscasts broadcast on this date contained 4 minutes of news (Afro-American Ex. 12).

18. All Sunday newscasts broadcast by KSOL during the 1977-1980 period were obtained from the network (Intercontinental Ex. 43, p. 7). The local newscasts broadcast on Saturdays were produced by part-time employees who rarely, if ever, left the station. They compiled the news from the newswire and used the telephone to check stories (Tr. 427, 894-895).

19. William Calhoun, program director from June 1975 until July 1976, testified that during that period KSOL had only one part-time newsperson (Tr. 1819-1820, 1826). Calhoun quit the station in anger (Tr. 1852-1853).

20. Aaron Stevenson, program director from about March 1 until July 1975, testified that only one person, Clarence Johnson, had news duties and he was fired for lack of money shortly after Stevenson became

program director (Tr. 1887-1893). After that there was no news staff; announcers read from the wire (Tr. 1895). Stevenson was apparently a source of information adverse to KSOL used by a petitioner to deny KSOL's 1980 application (Intercontinental Ex. 120, p. 26 *et seq.*).

21. Peggy Ann Wedlow was a volunteer worker at the station from the summer of 1971 until 1972 and as a paid employee from then until the fall of 1974 (Tr. 1986-1988). She said that prior to 1974 when Mr. Johnson was hired, no individual was solely responsible for news. Announcers would read news off the wire (Tr. 1992-1994, 2014). Wedlow had no news responsibilities (Tr. 2007) and became annoyed at the station in 1978 when a program she was to produce was canceled (Tr. 2330).

22. Kenneth Shubat came to KSOL as its general manager in July 1976 and continues to function in that capacity (Intercontinental Ex. 23; Tr. 367). When he first came to KSOL there was no news director; the public affairs director supervised the news department. Shubat could not recall whether there were news reporters employed at the station when he came (Tr. 368-369). At sometime prior to 1978, the supervision of the news department was shifted to the program director (Tr. 376-377). Shubat said that at sometime after he came to KSOL the station had one full-time reporter/announcer, Ms. Ball (Tr. 378); he later said he could not recall if this was true (Tr. 823). In any event, a full-time newsperson, Mr. Harrison, was employed in September of 1977 (Tr. 377). Harrison came because the program department felt the news department needed a full-time newsman (Tr. 821).

Community Witnesses

23. KSOL offered the testimony of 50 community witnesses relative to KSOL's service to San Mateo and the surrounding communities. Among these witnesses were mayors and former mayors;[6] members of the San Mateo County and San Francisco County Board of Supervisors;[7] a Municipal Court Judge;[8] local chiefs of police;[9] government officials and agency heads;[10] heads of private civic and human services organizations;[11] and representatives from educational,[12] law enforcement,[13] minority,[14] and social services organizations.[15] These witnesses testified with respect

[6] See Intercontinental Exs. 50, 78, and 91.
[7] See Intercontinental Exs. 95 and 96.
[8] See Transcript 640.
[9] See Intercontinental Exs. 52 and 80.
[10] See Intercontinental Exs. 54, 58, 74, 87, 68, and 5.
[11] See Intercontinental Exs. 47, 48, 53, 61, 65, and 97.
[12] See Intercontinental Exs. 60, 63, 70, 73, 77, 92, 95, and 99.
[13] See Intercontinental Exs. 67, 71, 75, 88, and 94.
[14] See Intercontinental Exs. 46, 57, 69, 92, and 99.
[15] See Intercontinental Exs. 62, 72, 76, 81, 82, 55, 59, 64, and 93.

to their familiarity with the programming of KSOL and the other community services which the station has provided.

24. Of these 50 witnesses, 10[16] reported appearances or PSA broadcasts on KSOL prior to 1978; of these 10, 6 spoke of the years 1976 and 1977;[17] the balance of 40 began their KSOL contacts in 1978 or later. Most spoke to the effectiveness of the station in publicizing the various causes which the witnesses were interested in and some noted its particular appeal to the Black community (Intercontinental Exs. 46, 48, 57, 69); youth (Intercontinental Exs. 48, 53); senior citizens (Intercontinental Exs. 47, 62); and others. Several emphasized that the station staff approached the community with offers to help (Intercontinental Exs. 62, 69, 71, 72, 80). Some spoke of the positive community response to the public affairs programming (Intercontinental Exs. 46, 53, 92).[18] A number gave KSOL employee Eleanor Curry credit for an important public affairs effort. She joined the station in early 1978 (Intercontinental Ex. 5).

25. Frederic Howell, called by San Mateo, resided in San Mateo from 1966 until 1980 (Tr. 1536). He was a member of a number of community organizations which were primarily concerned with matters relating to Blacks and other minorities (Tr. 1537-1540). From 1974 to 1980, he was employed as city planner for the city of San Mateo (Tr. 1542). He became aware of KSOL's efforts to meet the needs of minorities through the Neighborhood Council, to which various members of the community would express their concerns about programming at KSOL (Tr. 1544). He became aware of KSOL's nonentertainment programming through the New Experience Program, a communications project of the Telecommunications Department of the College of San Mateo (Tr. 1540, 1546).

26. Mr. Howell did not hear much nonentertainment programming on KSOL during the 1972-1976 period (Tr. 1546). Complaints were made to the Neighborhood Council that public service announcements were broadcast during nonprime hours such as 3 a.m. On August 7, 1975 the Neighborhood Council requested a meeting with the KSOL general manager because of concerns about "employment, labor practices, programming and responsiveness to the community of license" (San Mateo Ex. 7). A meeting of 50 to 75 members of the community was subsequently held with then KSOL general manager, Mr. McClain (Tr. 1555). Participants expressed concern about news, programming, the scheduling of public service announcements, and the employment of Blacks in management positions (Tr. 1556-1557). Concern was expressed as to the lack of local and minority oriented news (Tr. 1559). KSOL did not assist

[16] See Intercontinental Exs. 50, 59, 62, 69, 77, 80, 81, 84, 91, and 97.

[17] See Intercontinental Exs. 50, 59, 62, 77, 84, and 91.

[18] The exhibits cited are not exhaustive; others could be mentioned in support of any of the propositions.

the community organizations Mr. Howell was involved in during the 1972-1975 period (Tr. 1572). KSOL did not approach Mr. Howell in his capacity of city planner or anyone on his staff to participate in any programs on the station during the 1974-1977 period (Tr. 1573-1574).

27. Sylvester Hodges,[19] called by San Mateo, has been community service manager in special community relations for the San Mateo Parks and Recreation Department. He supervises the activities and staff of three facilities: Martin Luther King Center, Lakeshore Recreation Center, and Shoreview Recreation. He also is in charge of special projects such as the daycare facility, summer playgrounds, and community workers. These facilities provide recreational activities except the King Center, which also provides social programs for the minority community. He has held his present position since 1970 (Tr. 1639-1640). The facilities are used about 80% by minorities (Tr. 1642). He has belonged to a number of organizations between 1970 and 1978 primarily concerned with matters of interest to minorities (Tr. 1643-1648).

28. Mr. Hodges' duties included submitting public service announcements concerning the centers to radio stations, including KSOL, beginning in 1970. He said that on most occasions, the announcements were not run (Tr. 1649-1650).[20] He did not submit announcements in 1977 since he was dissatisfied with the station during that period (Tr. 1656-1657). Until 1978 he was not asked to appear on any KSOL program nor did KSOL have a program publicizing the activities of the center (Tr. 1657-1658). He testified that there was a change in KSOL's receptiveness to broadcasting the center's announcements when Eleanor Curry took over these announcements (Tr. 1712).

29. Hodges also testified respecting a meeting to discuss KSOL in January 1978 at the Martin Luther King Center at which two KSOL representatives, center members and others were present (Tr. 1661 *et seq.*). Hodges' recollections relating to the meeting and associated matters were challenged on a number of points by KSOL attendees and by Elmer Buchanan, a center officer. No useful purpose would be served by comparing the various versions of what occurred at the meeting.[21] The

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[19] Intercontinental, at page 131 of its Phase I Findings alleges that Howell was part of the Marcus Garvey Wilcher group which petitioned to deny the KSOL renewal. No citation to the record is given.

[20] Hodges also testified that the PSAs which were broadcast were run at times when the audience to which they were directed was not available (Tr. 1649-1650); KSOL's composite logs for the 1974, 1977, and 1980 renewal applications show PSAs broadcast throughout the day (Intercontinental Exs. 102, 115, and 116).

[21] Intercontinental has provided an account of this situation in its proposed findings, Phase I, at pages 133 *et seq.*; one may use this account as a convenient index to the portions of the record involved whether or not Intercontinental inferences are accepted.

matter is only noteworthy to indicate that Hodges' memory of KSOL related matters at that time is fallible.

The WOOK(AM) and WFAB(AM) Renewal Proceedings

30. The Commission has denied applications of several of the broadcast licenses of Intercontinental's parent, United. Two of those renewal cases are relevant here as part of Intercontinental's past broadcast record. Though new findings of fact are not here made, for the purpose of perspective, United's delinquencies at WOOK(AM) and WFAB(AM) will be briefly stated.

31. In the WFAB case[22] the Commission concluded that during the period January 1971 through May 1972:

> . . . a violation of Section 73.1205 of our Rules had occurred because the licensee had failed to exercise reasonable diligence to see that its employees did not issue documents containing false information or misrepresenting the nature or content of advertising broadcast on the station. We determined that the billing practices of WFAB's local management directly facilitated a fraudulent scheme perpetrated by a local retail appliance dealer, and that these practices of the local WFAB management were the direct result of the licensee's abandonment of control and supervision with respect to station billing practices.

The WFAB license was not renewed.

32. In the WOOK(AM) case[23] the renewal application was denied because United was found unqualified. That conclusion was based on findings: (a) that various ministers used WOOK to broadcast offers of scripture citations which were really numbers game tips in return for donations; (b) that ministers used WOOK to broadcast offers of "roots," "baths," etc. with promises of financial blessings and solutions to personal problems which were false and misleading and that United failed to take reasonable measures to prevent such use of its facilities; (c) that in spite of having notice from the Federal Trade Commission that it was investigating the veracity of the advertisements of Empeco, a WOOK advertiser, United failed to conduct any inquiry respecting the ads; (d) that "advertising carried for Richard Eaton's book . . . did not conform to guidelines established by the Federal Trade Commission for determining the regular selling price for items offered at discount"; (e) that United repeatedly violated Commission technical rules for which a $7,500 forfeiture was assessed. Even so "in reliance on representations that its future operations would be in compliance with the technical rules, United's license was renewed, [citation omitted]. Notwithstanding the forfeiture and its representations, the violations continued. A subsequent inspection on September 3, 1969, disclosed 19 violations of the Commission's rules [n. omitted]." The Commission further found: "that United's

[22] *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832; *recon. denied* 60 FCC 2d 816.

[23] *United Television Co.*, Inc., 55 FCC 2d 416.

past representations were of no value, that no reliance can be placed on its present promises of future compliance, and that there are no mitigating factors."

Evidence of United Control Over Intercontinental Since 1976

33. In December 1976 the licensee retained Arent, Fox, Kintner, Plotkin & Kahn to act as its communications counsel and to assist it in developing and maintaining appropriate control mechanisms (Intercontinental Ex. 44, p. 1).

34. In October 1977 Gary Gross was hired by United to serve as its director of operations.[24] Gross held a first-class radiotelephone operator's license and held both on-air and administrative positions in the radio industry before joining United. He was hired to develop and implement policies and procedures for all United stations which would assure compliance with Commission rules and policies. He worked closely with legal counsel to review existing station policies and operations, formulate means to enforce existing policies, and, as necessary, expand those policies or develop new ones in such areas as religious broadcasting, time brokerage, contests, program length commercials, and remote broadcasts. By the summer of 1978 such policies were in place or in their final stages of preparation (Intercontinental Ex. 44, pp. 1-2).

35. Since August 1978 William Parris, then United's national program director, has maintained regular contact with KSOL and its programming. He monitors the station's programming and routinely consults with the station's staff, United's corporate officials, and United's corporate counsel (Intercontinental Ex. 44, p. 4). Parris has considerable experience in programming, engineering, operations, and management (Intercontinental Ex. 40).

36. Both Parris and Gross have made frequent trips to KSOL to review the station's operations, handle any problems, and answer questions from members of the staff. Parris and Gross both have reported directly to Hroblak and have routinely briefed him on operations, licensee control, and all other matters concerning KSOL. KSOL's general manager periodically visits United's headquarters to confer with Hroblak and other corporate management (Intercontinental Ex. 44, pp. 4-5).

37. Hroblak has studied various aspects of broadcasting in order to become knowledgeable about the rules and policies established by the FCC and the policies adopted by the company. He keeps abreast of changes within the broadcasting industry and the regulatory process. United's counsel are in regular contact with United management (Intercontinental Ex. 44, pp. 5-6).

[24] Gross left United and Intercontinental in 1983.

38. Since the WFAB case, United has adopted changes in its stations' billing procedures and instituted a billing system so that all billing is done from United headquarters (Intercontinental Ex. 44, pp. 9-11).

39. In 1978 United began implementing policies relative to the broadcast of references to contests (Intercontinental Ex. 44, pp. 12-17). This effort resulted in the adoption of guidelines relative to the broadcast of any contest related information. Joyce Castagnola is director of marketing for a company which sells records at retail outlets in the Bay Area. She has developed about 20 to 30 contests per year to promote records and has become familiar with the advertising policies of the radio stations in the Bay Area. She has worked with KSOL contest policies since 1977 and characterized them as being very tight, requiring more information than any other radio station with which she has dealt. KSOL has required detailed winner selection information, the identity of judges in advance, and copy concerning a contest to be provided by the advertiser three weeks before broadcast for review purposes. As a result of the extensive information KSOL requires and since other stations do not require nearly as much detail, Castagnola has done very few contest promotions with KSOL since 1977 (Intercontinental Ex. 44, App. E, pp. 1-2).

Relative Rank

40. According to Arbitron's survey of the 1980 renewal application composite weeks for radio stations in the San Francisco Metro Survey Area, KSOL's rankings are as follows: 5th among the FM stations for total number of minutes of nonentertainment programming; 7th among FM stations for percentage of time spent on nonentertainment programming; 6th among FM stations in total minutes of public affairs and other nonentertainment programming and 7th in terms of percentage of broadcast time; 24th among 61 AM and FM stations in total minutes of news programming and 28th in percentage of broadcast time; 15th among 61 AM and FM stations in total minutes of public affairs and other programming and 20th in percentage of broadcast time (Intercontinental Ex. 101).

Nonbroadcast Community Activities

41. During 1978, 1979, 1980, and 1981 KSOL sponsored 52 events including a wide variety of activities including sponsorship of sports teams for charitable events, helping in charitable fund drives, furnishing speakers for community activities, sponsoring a scholarship at a local college, contributing funds and record albums, and many other activities (Intercontinental Ex. 45).

Afro-American

42. Afro-American is a California corporation with the following stockholders, directors, and officers (Afro-American Exs. 4, p. 9; 3, p. 3; 2, p. 5; 1, p. 1):

Name	*Office*	*Director*	*Ownership Share*
Stanley P. Herbert	President	Yes	30.61%
Del Green	Secretary, Chief Financial Officer	Yes	30.61%
Frederick E. Jordan	Vice President	Yes	30.61%
Errol G. Chisom	Vice President	Yes	8.16%

43. Hebert, a Black, of Oakland, California, is a lawyer with wide experience in teaching, private practice, commercial employment, and government service. He has been general counsel for the Port of Oakland, California since 1977. He has been active in a variety of religious, social, and educational activities. Community activities in the Bay Area have included the Urban League, where he was a director; regent of the College of the Holy Names; advisory board member for a professional development program at University of California at Berkeley; vice president of Marcus Foster Educational Institute which provides scholarships for students and grants to teachers in the Oakland school system; board member of the Museum of California in Oakland; member of the Oakland Symphony Orchestra Association (Afro-American Ex. 4). He proposes to spend a minimum of 20 hours per week as the station's legal affairs director, coordinator of the equal employment program, and director of community relations (Afro-American Ex. 4, p. 10). Hebert will also produce and host a 90-minute interview-discussion-call-in program beginning at 9 p.m. on Sundays. He intends to utilize the large number of Black professionals and artists available in the area to comment on Black history and culture (Afro-American Ex. 4, pp. 10-11). Hebert anticipates that his duties as legal affairs director will diminish to fewer than seven hours per week after the station has begun operating (Tr. 1204-1205). At first, he believes the Afro-American forum will require more than 15 hours a week of his time and his initial commitment will exceed 20 hours (Tr. 1206-1207). He will be consulted relative to employment actions respecting equal employment opportunity (Afro-American Ex. 1, p. 8; Ex. 3, p. 4).

44. Del Green, a Black, lives near San Mateo. Since 1972 he has been president of Del Green Associates, a San Francisco management consultant firm which he founded. He has long been a member of Mexican-American Political Association which seeks to raise the level of the political awareness of Mexican-Americans (Afro-American Ex. 3; Tr. 1123-

1124). He was on the San Mateo County Human Rights Commission in 1976-1977. Green is proposed as general manager and will work a minimum of 25 hours a week in that capacity (Afro-American Ex. 3).His duties will involve implementing and supervising station policies; he will meet daily with the station manager and sales manager and directly oversee the station manager; most of his time will be taken with sales and promotional activities; he will develop budgets and staffing plans; he will have the ultimate authority to hire, fire, and promote (Afro-American Ex. 3). Green will continue his work at his consulting firm which does not require his absence from the city and will also continue his work on the Presidential Advisory Committee on Small Business Affairs and Minority Business Ownership which requires little travel (Afro-American Ex. 3; Tr. 1146).

45. Frederick E. Jordan, a Black, is a civil engineer who lives in San Francisco and has lived in the Bay Area for 15 years. He was a founding partner of Jordan/Avent & Associates, the largest Black owned engineering, architectual, and planning firm in the western United States and is now president thereof. This firm has offices in San Francisco and five other cities. Jordan was president of the San Francisco Bay Area Urban League in 1971 and is now a member of the board of directors. He has been active in a number of Bay Area educational, professional, and minority oriented organizations (Afro-American Ex. 2). Jordan proposes to work at the station a minimum of 15 hours per week. His duties will include the design, implementation, and supervision of a minority training program, which will train, at all times, two or three minority group members in various radio oriented pursuits while going to college. This will, on an average, consume about six hours per week of Jordan's time. He will also be technical director for the station and, as such, will monitor and supervise the engineering aspects thereof. This, he feels, will take about seven hours per week. He will also conduct a 15-minute Sunday evening program reporting on the efforts of local organizations to train minority business managers and to assist in financing minority businesses. The preparation, production, and taping of this program will occupy three hours per week (Afro-American Ex. 2).

46. Errol G. Chisom is a Black resident of Oakland, California. He now works as a press aide for a state assemblyman (Tr. 966). From 1968 to 1980 he worked in various aspects of radio news much of which was in the Bay Area. He has been a news announcer, field reporter, public affairs director, executive producer, and news director at an all news station. Chisom will be full-time station manager and will be responsible for all nontechnical operations of the station under Del Green. He will interview prospective employees and with Mr. Green, make decisions on hiring, firing, and promotions of employees. He will be involved with sales and

promotion and supervise the sales manager on a day-to-day basis. He will produce two programs (Afro-American Ex. 1). Mr. Chisom has paid $100 of his total subscription of $4,000. The balance will be paid if a construction permit is granted to Afro-American but Mr. Chisom has no understanding of what his obligation is if the application fails. Nor does he know what, if anything, he will contribute to construction expenses (Tr. 962-964). He has provided no funds for expenses of prosecuting the application (Tr. 1063). Mr. Chisom paid only 2.5% of his subscription when he subscribed, while the other subscribers paid 10% (Tr. 1099-1100).

47. Neither Afro-American nor any of its principals owns any interest in any medium of mass communications.

San Mateo

48. San Mateo is a California corporation with the following stockholders, officers, and directors (San Mateo Ex. 1, p. 1; Ex. 2, p. 1):

Name	*Office*	*Director*	*Ownership Share*
Arthur W. Mayo	President/Treasurer	Yes	90%
Walter R. Mayo	Vice President	Yes	10%

49. Arthur W. Mayo, a Black, is a physician who lives in Orinda, California, about 25 miles from San Mateo. He has been an officer or director in various medical societies, a consultant to the Selective Service Board, and a fund raiser for the City of Hope Medical Center. Dr. Mayo intends to spend 20 hours per week on his duties as president of the station. These duties include setting policies and objectives and assuring implementation, reviewing fiscal recommendations, attending weekly staff meetings, review hiring and firing of key personnel, be responsible for the equal employment opportunity program, and other duties as needed. Dr. Mayo spends about 25 hours per week at his medical practice. He spends 30 hours per week supervising a McDonald's franchise owned by Carda, Inc., which he and his wife own in equal shares. He also teaches at the University of California Medical School during two months in the fall of the year and also teaches at Children's and Mt. Zion hospitals (Tr. 1413). At the time of the hearing, Dr. Mayo and his wife were seeking a new McDonald's franchise near the old one (Tr. 1405-1408) and later amended the San Mateo application in a December 16, 1982 filing to report that the new McDonald's had opened in November 1982. Carda, Inc. also has a 12-unit condominium development which it rents and sells (Tr. 1403-1404).

50. In an amendment filed January 16, 1980 San Mateo represented that Dr. Mayo would devote about 15 hours per week to the station and be "responsible for policy and goal determination, implementation, station performance and critique" (Intercontinental Ex. 104, p. 4; Tr. 1399). Dr.

Mayo became aware that less than a 20-hour per week integration proposal would not be sufficient to earn quantitative integration credit (Tr. 1398-1399). He then had a discussion with his wife, the upshot of which was that she agreed to transfer to him the 39% interest in San Mateo which she then owned and pick up five hours per week of the time he spent at the McDonald's franchise to enable him to increase his commitment to the station to 20 hours (Tr. 1400-1402). The total time spent for the station will be made up by reducing his time spent at McDonald's by 7 hours per week and taking the remaining 13 hours from current free time in the work week, evenings, and weekends (San Mateo Ex. 1, p. 4).

51. Walter R. Mayo, a Black, now resides in New York. He has been involved in banking for a number of years and is now a credit officer for the Chemical Bank dealing with the Middle East and Africa. If the San Mateo application is successful, Mayo will move to the Bay Area and work at the station at least 40 hours each week as vice president. His duties will involve tax matters, budget preparation, financial projections and fiscal analyses, establishing bookkeeping procedures, and supervising billings, collections, and accounts payable. He will be San Mateo's principal spokesman in the service area (San Mateo Ex. 2). At a deposition taken on April 13, 1982 Walter Mayo said that he would have no duties except that of chief financial officer (Tr. 1466-1467).

52. Walter Mayo owns no stock in the applicant now. When Walter Mayo joined the group (then composed of Dr. and Mrs. Mayo) he paid $4,000 to San Mateo in cash and signed a note on December 11, 1980 payable to Dr. and Mrs. Mayo for $5,400 payable over five years and it was agreed that he would receive no stock until the note was paid (Tr. 1312-1329).[25]

53. San Mateo proposes an auxiliary power supply (San Mateo Ex. 1, p. 5).

Conclusions

54. The only issue is the comparative one and since Intercontinental is a renewal applicant, it is appropriate to first consider Intercontinental's past performance. If analysis of that history results in a conclusion that Intercontinental's record is "meritorious" or "substantial," a "legitimate renewal expectancy" is factored into the comparative process; if the record reflects "minimal service" there is no such expectancy to be considered. See *United Broadcasting Company, Inc., [WOOK(FM)],* — RR 2d —.

[25] Payment of the deferred payments to Dr. and Mrs. Mayo is said by Dr. Mayo to have been an error in drafting the note and that the deferred payments should go to San Mateo (Tr. 1330).

55. As in the earlier proceeding involving the WOOK(FM) license, the renewal applicant urges that the only relevant part of its past record is the latest (1977-1980) renewal period (Phase III Reply Findings, p. 22). The *United* decision, *supra,* has settled that question adverse to the Intercontinental position. The relevant period of inquiry begins in 1968, when the license was last renewed, and extends to October 27, 1980, the date the first competing application was filed.

56. Intercontinental chose to present little evidence relative to the period prior to 1978. What is available comes mostly from the renewal applications filed in 1971, 1974, and 1977 (offered by San Mateo), some testimony from witnesses provided by the other applicants, some from Intercontinental's witnesses on cross-examination, and some from community witnesses called by the renewal applicant. The renewal applications indicate that news programming for the composite weeks involved in the 1971 application amounted to 5% of broadcast time; in 1974, 5.45%; in 1977, 5.8%. The same applications showed for public affairs programming, .75% in 1971; .27% in 1974; and 1.3% in 1977. For "other" programming the applications showed 2.04% in 1971; .89% in 1974; and 3.3% in 1977. There is no evidence in the record respecting the time spent by other stations in similar programming at contemporaneous times but the time spent by KSOL on news in the 1977-1980 composite week is similar, 5.04%, while the time spent on public affairs is somewhat higher, 1.49%, and the time spent on "other" programming is much higher, 5.13%, than in any of the previous periods. The only other conclusion which may be made with regard to the pre-1978 programming is that news was largely a "rip and read" operation until late 1977, a year or more after present manager Kenneth Shubat arrived and few conclusions can be drawn about the nonprogram aspects of this period. Some community involvement occurred according to the handful of community witnesses who testified relative to this time and the parent organization, United, had imposed a close control on billing beginning in 1973. The short of it is that Intercontinental had the burden of proving the quality of its 1969-1977 record and elected not to try. It is concluded that the performance at KSOL from 1969 to 1977 was no more than minimal.

57. The years 1978-1980 are different. There is evidence of an expanded news staff including local reporters. Community relationships were the subject of a successful effort on the part of Eleanor Curry. United imposed control on advertising contests which were more strict than the area norm. There was an increase in nonentertainment programming other than news and sports. Arbitron comparisons for news, public affairs, and "other" programming were good in some areas and at least respectable in all others. United employees Gross, Parris, and Hroblak became active in supervising KSOL activities in an effort to assure

adequate broadcast performance. The performance during these years was substantial.

58. Intercontinental filed a pleading on August 5, 1983 expressing its view on the necessity of adding an issue respecting the United derelictions at WFAB and WOOK(AM). It was then urged that a "nexus" between the wrongdoers at those stations and those responsible for KSOL must exist to support any determination that the WOOK(AM)-WFAB matters should be considered part of Intercontinental's past record. The reason for considering a broadcaster's record is that its past has value as an indicator of what it will do in the future. To argue that since KSOL's local management had nothing to do with United's problems at WOOK(AM) or at WFAB and that, therefore, those matters should not be factored into the prediction of how KSOL may be expected to operate, inverts the Intercontinental-United relationship. A conclusion in the *United, WOOK(FM), supra*, case was that the WOOK(AM)-WFAB matters weighed against United in analyzing its past record. United is the parent of Intercontinental through its ownership of 92% of the latter's sole owner. Whatever an United controlled KSOL might do in the future is what United would want it to do.

59. Intercontinental's substantial performance from 1978 to 1980 must be weighed with its no more than minimal performance during the earlier years and the United record at WOOK(AM)-WFAB. The total record is a minimal one.

60. With no renewal expectancy, Intercontinental is compared to the other applicants on the remaining grounds of diversity of media ownership and best practicable service, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. Neither San Mateo nor Afro-American are charged with other media interests and both are entitled to integration credit. Intercontinental, as a part of United, is charged with other broadcast stations and claims no credit for integration. It need not be further considered in the comparative process.

61. All principals of Afro-American and San Mateo are Black; they are equal with respect to that facet of qualitative enhancement respecting integration.

62. Afro-American proposes Errol G. Chisom, an 8.16% stockholder, as its station manager and only full-time integrated stockholder. While the other applicants attack his responsibilities as not being sufficiently managerial, and because most of his financial commitment appears to be contingent on Afro-American's success, the proposal will be credited. Mr. Chisom is the only one of the Afro-American principals with broadcast experience and is to be second in command at the station. That the terms of his stock acquisition may be more favorable than the others does not mean that he will not be an owner. Mr. Chisom's integration credit is

enhanced by his previous, mostly Bay Area, broadcast experience, and past, present, and future Bay Area residence.[26]

63. San Mateo proposed Walter R. Mayo as its full-time integrated principal. He will have 10% of the issued stock and will either be financial officer or that and something more. In any event, he will have managerial duties. While the transaction under which Mr. Mayo gained his right to stock ownership was hardly mirror-smooth, there is no reason to believe he will not be issued his 10%. Mayo's integration credit is enhanced by his intent to move to the Bay Area.

64. Afro-American proposes just over 60% of its ownership for part-time integration in the persons of Stanley P. Hebert and Del Green, each of whom has a 30.61% share. Since Frederick E. Jordan proposes only 15 hours per week, his 30.61% share may not be credited. *Midwest Broadcasting Company*,70 FCC 2d 1489, 1495. Mr. Hebert's status as a manager is challenged because he will spend some time in programming. Hebert's status as an owner, corporation president, and community relations director (aside from his other functions) make it clear that his interests run beyond program production and presentation. That he will spend some time in the latter pursuits does not detract from his responsibility, during his hours of service, for his other duties. Afro-American's three part-time participants[27] exhibit a wide background in Bay Area professional, educational, cultural, and public service related activities.

65. San Mateo's only part-time participant is Arthur Mayo who plans to spend at least 20 hours a week in station activities. This commitment is challenged as too thinly spreading Dr. Mayo's time but he seems at least as capable of fulfilling his promise as have others in cases past. *Greater Wichita Telecasting, Inc.*, 51 RR 2d 1604, 1607. Dr. Mayo's local residence and wide variety of Bay Area community activities qualitatively enhances the San Mateo proposal.

66. As between the three determining factors: enhanced full-time participation, enhanced part-time participation, and San Mateo's proposed auxiliary power supply, the most important factor is enhanced full-time participation. Since Afro-American's proposal is for 8.16% and San Mateo's is for 10%, there is no "clear quantitative advantage" to the San Mateo proposal and qualitative considerations must be used to determine a balance if there is a substantial qualitative difference. *Merrimack*

[26] It is also argued that time spent by Chisom in program production is not management, that the time so spent must be subtracted from his "full-time" commitment, and that he is necessarily reduced to a part-time status. "Full time" and "part time" are imprecise concepts; that a manager spends some of his time at less than managerial duties does not detract from his presence or responsibility as a manager.

[27] Though Jordan's 15-hour commitment does not qualify for quantitative credit, his proposal provides qualitative enhancement.

Valley Broadcasting, Inc., 52 RR 2d 1210. There is. San Mateo's only proposed part-time participant lives in New York and proposes to move to the Bay Area should his applicant receive a grant; Afro-American's sole proposed integrated stockholder has lived in the Bay Area, now lives there, and intends to stay. In addition he has been involved in occupations which would lead to an awareness of the community and has broadcast experience. Afro-American enjoys a moderate preference for full-time integration.

67. The next standard, part-time integration, is of much diminished importance. *Merrimack Valley, supra.* Since Afro-American is entitled to only about 61% part-time integration and San Mateo proposes 90%, the quantitative difference is clear in *Merrimack* terms and may not be overcome by qualitative factors. However, the difference between the two applicants is diminished by the superiority of Afro-American's community involvement. While Dr. Mayo has been associated with extensive community activity, his three Afro-American counterparts have, among them, a more diverse experience. San Mateo has a moderate part-time integration preference.

68. The question then becomes whether San Mateo's moderate preference for part-time integration added to its slight preference for an auxiliary power source is sufficient to overcome Afro-American's moderate full-time preference. It is a close question because of the small amount of full-time integration proposed by each applicant compared to a much larger part-time commitment. But the Afro-American position prevails.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the rules, the application of Intercontinental Radio, Inc., for renewal of its license to operate an FM station on channel 299, San Mateo, California, IS DENIED; the application of San Mateo Broadcasting Company, Inc. for a construction permit for a new FM station to operate on channel 299, San Mateo, California, IS DENIED; and the application of Afro-American Communications for a construction permit for a new FM station to operate on channel 299, San Mateo, California, IS GRANTED.[28]

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL, *Administrative Law Judge*

[28] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Character Qualifications, Nondisclosure
Obscene, Profane, Indecent Language
Reconsideration, Petition, for Denial of

Petition for reconsideration of *Kaye-Smith Enterprises*, FCC 84R-42, released June 8, 1984, denied. Petition to add a Section 1.65 issue also denied.
—*Kaye-Smith Enterprises*
BC Docket No. 82-265

FCC 84R-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Dena Pictures, Incorporated Alexander Broadcasting Company, A Joint Venture d/b/a Kaye-Smith Enterprises	
For Renewal of License of Station	BC Docket No. 82-265 File No. BRH-801001UZ
Vincent L. Hoffart d/b/a Hoffart Broadcasting Seattle, Washington	BC Docket No. 82-266 File No. BPH-801229AE
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1984 Released: August 7, 1984

BY THE REVIEW BOARD:

1. The Review Board has under consideration two pleadings filed by Hoffart Broadcasting (Hoffart): (a) a petition, filed June 21, 1984, seeking reconsideration of our Decision released June 8, 1984 (FCC 84R-42) affirming the Administrative Law Judge's (ALJ) Initial Decision granting Kaye-Smith Enterprises' (Kaye-Smith) application for renewal of license

for Station KISW(FM), Seattle, Washington, and denying Hoffart's competing application for a construction permit to operate on the same frequency, and (b) a petition, filed June 11, 1984, requesting addition of a Section 1.65 reporting issue against Kaye-Smith. Oppositions to both requests were filed by Kaye-Smith.

2. Hoffart's petitions will be denied. Turning first to the petition for reconsideration, Hoffart initially contends that Station KISW has a history of broadcasting obscene, indecent, or objectionable programming. Appended to his brief in support are six letters received by the Commission over a thirty-eight month period, the most recent letter received on April 4, 1984, complaining of offensive language allegedly aired over Station KISW. We conclude, however, that the complaint letters are not sufficient to cause us to reconsider our Decision.

3. The Commission has previously stated that its primary concern at renewal time is not with individual programs, but rather with the more limited issue of whether the licensee's programming on an overall basis has been in the public interest. *See Pacifica Foundation*, 36 FCC 147 (1964). Here, we conducted such an evaluation and concluded that Station KISW's overall past broadcast performance has been in the public interest. Thus, we affirmed the ALJ's award of a strong comparative preference to Kaye-Smith for Station KISW's past performance during its license term, adopting his findings concerning the licensee's on-going ascertainment of community problems, needs, and interests; its contact with numerous community leaders; its handling of issues of interest to the area through regularly scheduled news, public affairs, and other nonentertainment programs, and public service announcements; its local production of programs addressed to community problems; and its noteworthy reputation in the community. *See Decision, supra*, at paras. 2, 17. Additionally, we noted that KISW's nonentertainment programming, as shown by its composite week performance, exceeded the amount promised in its earlier filed renewal application. Decision at para. 17. The complaint letters (assuming, arguendo, their accuracy — and Kaye-Smith does not dispute them) relate solely to a few isolated instances presented over a thirty-eight month period and are not sufficient to undermine our determination that KISW's overall past broadcast performance was substantial and merited a strong renewal expectancy preference. The letters do not reflect a clear cut pattern of operation inconsistent with the public interest standard. As pointed out in our Decision, with respect to the most recent letter (see para. 24 denying Hoffart's petition for enlargement of issues based on the incident referred to in the April 4, 1984, complaint letter), the station acted responsibly in taking corrective measures after the offensive material had been aired; that is, the offensive language occurred during a live interview, the interview was

discontinued when the interviewee would not modify his language, and a taped apology by the interviewee was subsequently repeatedly broadcast over the station. In light of the above, we are persuaded that further inquiry concerning this matter is not warranted. *See Pacifica Foundation*, 95 FCC 2d 750, 760-761 (1983).

4. Hoffart's next contention is that Station KISW violated the Commission's Equal Employment Opportunity (EEO) rules and guidelines. In support, he attaches the station's Annual Employment Report for 1984 which he claims shows the station's percentage of ethnic employees to be below the area's workforce. This allegation, too, is insufficient to support reconsideration of our Decision. Although no EEO issue was designated in this proceeding, the ALJ thoroughly explored the station's EEO efforts during its last license term and concluded that it was clear that the licensee's policy was to provide equal employment opportunity to all qualified applicants for positions at the station. Initial Decision, FCC 83D-65, released November 25, 1983, at para. 58. Hoffart's exceptions did not challenge these findings and his current submission of KISW's 1984 Annual Employment Report is not in and of itself sufficient to undermine those findings or to support the addition of an EEO issue. *See Stone* v. *FCC.*, 466 F.2d 316, 329-330 (D.C. Cir. 1972) quoting *WTAR Radio-TV Corp.*, 19 RR 2d 661, 668; "Simply indicating the number of Blacks employed by the licensee, without citing instances of discrimination or describing a conscious policy of exclusion is not sufficient to require an evidentiary exploration"; *See also Alainde, Inc.* FCC 84-160 para. 2, released April 18, 1984 ("the determinative factors in our evaluation of a station's employment practices are not employment statistics but the thoroughness of the station's EEO program and the good faith efforts undertaken to make that program work"). Furthermore, we note that Hoffart's efforts to prolong this inquiry indefinitely by presenting additional material in a piece-meal fashion must fail since litigation must end at some reasonable point in time. *Cf. Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1337 (Rev. Bd. 1984), quoting *Valley Telecasting Co., Inc.* v. *FCC*, 336 F2d 914, 917 (D.C. Cir. 1974), "Orderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale as reflecting a public policy which has authentic claims of its own." Based on the allegations here presented, we believe that that time has already passed.

5. Hoffart's third contention will also be rejected. Hoffart submits copies of the 1980 renewal applications of commercial FM stations in the Seattle area which he claims, show, on average, a greater percentage of non-entertainment programming (9%) than that aired by Station KISW (6.61%). This submission is too late. The requisite showing for reopening the record is that the request must be supported by newly discovered

evidence, the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing, and the evidence must if true affect a basic part of the decision. *See The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 20 RR 2d 1084 (1971). Here, there has been no showing that any of these requisites have been met. The information was accessible at the time of the hearing, and in view of the positive findings favoring KISW's renewal (para. 2, *supra*), we do not perceive that it would have affected the Decision. Hoffart's final argument in support of reconsideration is that he was prejudiced because he did not attend the oral argument. This argument is totally unfounded. As noted in our Decision, *supra*, at n.1, Hoffart voluntarily chose not to participate in oral argument before the Board, and he cannot now be heard to claim that his non-attendance negatively influenced our Decision. In sum, his petition for reconsideration will be denied.

6. Hoffart's second petition, which seeks addition of a reporting issue against Kaye-Smith, is predicated on the latter's amendment filed June 4, 1984, reflecting a grant of its application for a construction permit to increase the power of its Portland AM Station KXL. Hoffart argues that the material is decisionally significant and that it was not timely filed pursuant to Section 1.65 of the Commission's Rules, which requires the reporting of significant changes to the Commission within thirty days. The requested issue will be denied. A reporting issue will not be added unless a *prima facie* showing has been made that: (1) the unreported interests are of decisional significance, (2) an intent to conceal is present, or (3) a pattern of carelessness or inattentiveness is present. *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983). In the instant case, Station KXL was taken into account in the Initial Decision when the ALJ recited Kaye-Smith's broadcast ownership interests and no persuasive reason has been offered by Hoffart that the construction permit modification would have had any noticeable impact on our diversification evaluation; that is, Kaye-Smith already had a disadvantage under the diversification criterion because of its greater media interests and the power alteration resulting from the station modification would have had only minimal additional impact on our evaluation. See Decision, para. 26. Moreover, no intent to conceal is discernible and there is some indication that counsel erroneously believed that the information did not have to be filed until the grant was final, after which time he did report the interest here. Thus, we perceive no element of carelessness or inattentiveness. An issue is not warranted.

7. ACCORDINGLY, IT IS ORDERED, That the Petition to add 1.65 Non-Compliance Issue and the petition for reconsideration filed June 11 and 21, 1984, respectively, by Hoffart Broadcasting ARE DENIED; and

8. IT IS FURTHER ORDERED, That the petition for Leave to Exceed Number of Pages, filed June 21, 1984, by Hoffart Broadcasting IS

GRANTED, and the motion to strike Hoffart's Broadcasting's Response to " 'Erratum to Opposition" to 'Petition For Reconsideration," filed July 30, 1984, by Kaye-Smith Enterprises IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

[1] The Review Board has acted on all outstanding pleadings directed to its final Decision, *supra*, and this case is now ripe for Commission review since the Commission's Rules do not contemplate further pleadings being filed with the Review Board. *See* 47 CFR 1.115.

FCC 84R-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Dena Pictures, Incorporated Alexander Broadcasting Company, A Joint Venture d/b/a Kaye-Smith Enterprises	BC Docket No. 82-265 File No. BRH-801001UZ
For Renewal of License of Station KISW(FM), Seattle, Washington	
Vincent L. Hoffart d/b/a Hoffart Broadcasting Seattle, Washington	BC Docket No. 82-266 File No. BPH-801229AE
For Construction Permit	

Appearances

Peter Shuebruk and *Jerome S. Boros* on behalf of Kaye-Smith Enterprises; *Vincent L. Hoffart, pro se*; and *Charles E. Dziedzic* and *Robert A. Zauner* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: June 5, 1984; Released: June 8, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. In this comparative renewal case involving an FM broadcast station in Seattle, Washington, the task of Acting Chief Administrative Law Judge Fitzpatrick who presided at the hearing, and our review function, were complicated because the competing applicant Vincent L. Hoffart represented himself. See note 1, below. However, Mr. Hoffart is a veteran broadcaster with some 30 years experience, and our review of the record reveals that the presiding officer insured that both applicants were afforded an opportunity to develop a complete record on the three issues

specified for hearing. We affirm the ALJ's resolution of the designated issues for the reasons set out below and conclude that several petitions to reopen the record for further hearings have not been justified.

2. *Background.* A hearing was designated by the Commission because Kaye-Smith Enterprises, the licensee of Station KISW(FM), Seattle, Washington, filed for renewal of its license, and Hoffart Broadcasting sought authority to construct a new FM broadcast station in Seattle on the radio frequency now being used by Kaye-Smith. *See* FCC *Hearing Designation Order*, 90 FCC 2d 105 (1982). A trial-type hearing was held in 1982 on three specific issues: (1) Hoffart's financial qualifications; (2) Kaye-Smith's "notarial imperfections"; and (3) the comparative qualifications. In his Initial Decision, FCC 83D-65, released November 25, 1983, the ALJ found Hoffart financially qualified, imposed a slight demerit against Kaye-Smith on the "notarial imperfections" issue, and granted Kaye-Smith's application after concluding it was the better comparative applicant because of its past broadcast record. Exceptions and briefs have been filed by both Hoffart and Kaye-Smith on all of these above issues, and oral argument was held on February 24, 1984.[1] Hoffart also has filed several petitions requesting addition of new issues and a further hearing. After reviewing the record in light of the exceptions and briefs and the oral argument, we adopt the findings and conclusions in the Initial Decision, except as modified below, and deny the requests for further hearings.

3. *Finances.* The Commission specified a general financial issue against Hoffart noting certain deficiencies in his cost estimates and questioning his showing concerning the availability of funds to meet anticipated expenses. *Hearing Order, supra,* 90 FCC 2d at 108-110. The cost estimate deficiencies related both to Hoffart's $1000 a month estimate to use the same transmitter and antenna site currently leased to Kaye-Smith, and the absence of written documentation verifying the costs and terms of his equipment lease. At hearing, to meet the first objection, Hoffart submitted a copy of Kaye-Smith's lease, dated January 21, 1981, which showed that Kaye-Smith leases the site for $500 per month. *I.D.*, para. 81. Additionally, because he did not discuss with the lessor whether the site would be available to him, Hoffart specified a site owned by Kaye-Smith as his alternate site. *I.d.*, at para. 82. With respect to the objection

[1] Some needless procedural skirmishing, which *might* not have been engaged in by more experienced legal counsel, is illustrated by the exchange of pleadings and letters concerning oral argument filed by Hoffart on February 8 and 17, 1984. This exchange was brought to a halt by Board Member Jacobs' Letter Ruling dated February 10, 1984. For his own tactical reasons Mr. Hoffart chose not to participate in oral argument before the Board. This incident also demonstrates more than the traditional propensity to turn a competitor's simple mistake into a deliberate attempt to mislead or deceive. See also paras. 14-15, 22-24 below.

regarding his equipment lease, Hoffart submitted a written equipment lease proposal setting forth the costs and terms of the lease. *I.D.* at para. 80. The ALJ accepted the showings and concluded that Hoffart's total costs for construction and three months operation would be $262,500. *I.D.*, Concl. at para. 3.

4. To meet those costs, Hoffart intends to rely on a $200,000 loan from a friend, Howard Graves, and on his own assets. *I.d.*, at para. 83. Partial assets of Graves totaling more than $86,000 in liquid assets and $300,000 in real estate were listed by the ALJ with no liabilities. I.d., at para. 90. Graves would, if necessary, take out loans secured by the real estate he owns to meet his commitment to Hoffart. *I.d.*, at para. 91. Hoffart also has approximately $64,000 of his own in liquid assets. *I.d.*, at para. 84. The ALJ concluded that the $200,000 loan from Graves was available to Hoffart and that Hoffart was financially qualified to construct and operate the proposed broadcast facility. *I.d.*, Concl. at para. 4.

5. Kaye-Smith challenges the ALJ's conclusion contending initially that Hoffart failed to show that his proposed costs were adequate for construction and operation of the station; that is, it argues that because the financial issue was a general one, Hoffart introduced no evidence to show that his legal, engineering, installation, and miscellaneous costs were adequate. Additionally, it observes that Hoffart relied on the proposal of another applicant in Seattle to arrive at his three month operating cost estimate. We find no merit in Kaye-Smith's contention. As noted in para. 3, above, the Commission's *hearing order* questioned only two cost items proposed by Hoffart, neither of which is among the items now being challenged by Kaye-Smith. Moreover, the record reveals that the issue, insofar as it related to estimated costs, was tried as though it was limited to the two defects set out in the hearing order. *United Broadcasting Co., Inc.*, 94 FCC 2d 938, 954, (Rev. Bd. 1983). The ALJ examined the evidence adduced and resolved the issue in Hoffart's favor. It would be procedurally unfair in light of our hearing practices to let Kaye-Smith raise for the first time in exceptions objections to cost estimates that have not been presented below. Moreover, Kaye-Smith has not shown that the challenged cost estimates are so far below average or beyond a range of reasonableness as to lead us to a conclusion that Hoffart could not operate the station as proposed. *See Thunder Bay Broadcasting Co.*, 49 FCC 2d 1023, 1028, 31 RR 2d 1569, 1576 (1974). Finally, the fact that Hoffart can base his estimate on more than 35 years of broadcast experience is entitled to some weight in considering whether his legal expenses and other cost estimates are reasonable. *Id.* at 1028 n 10, 31 RR 2d at 1576 n.10. We discern no basis in law or in fact to overturn the ALJ's findings in this regard.

6. Next, Kaye-Smith contends that Hoffart failed to show that he has sufficient funds to meet his estimated expenses. It observes that the liquid assets of Graves and Hoffart, together, total only $150,987 and that the remainder of the $262,500 Hoffart needs must come from funds secured by the real estate of the two men. Kaye-Smith argues, however, that there has been no showing as to the ability of either Graves or Hoffart to sell or mortgage the properties involved. We reject Kaye-Smith's contention. In concluding that Hoffart could meet his projected costs of $262,500, the ALJ noted that Hoffart has available to him $64,487 in liquid assets of his own, which is not disputed, and a $200,000 loan from Graves for a total of $264,487. Although Kaye-Smith is correct that Graves' liquid assets ($86,000) coupled with those of Hoffart are not sufficient by themselves to meet the projected costs, Graves also has over $300,000 in real property which he is willing to mortgage or sell to ensure that he can meet his $200,000 loan commitment to Hoffart. Tr. 901. Additionally he has another $180,000 in assets that were not listed. *Id.*

7. The Commission has held that "ownership of nonliquid assets several times the value of the cash which such are relied upon to yield" provide a reasonable assurance of the ability to obtain the required funds. *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *see Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev. Bd. 1982); and *Cannon's Point Broadcasting Company*, 93 FCC 2d 643, 53 RR 2d 953 (Rev. Bd. 1983). And, an applicant's valuation of such nonliquid assets as real property will be accepted provided that it is supported by a "valid appraisal." *See Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 n.9, 43 RR 2d 1317, 1325 n. 9 (1978); *compare Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 656 n.9, 54 RR 2d 367, 372, n.9 (Rev. Bd. 1983) (appraisal found not to be valid.") Here, we find that the test of a "valid" appraisal was met. A buyer previously entered into a sales contract with Graves to purchase for $225,000 two of the real estate parcels listed by Graves at an aggregate value of $200,000. The buyer subsequently decided not to purchase the parcels. Tr. 900-901. The second parcel of property, a condominium, valued by Graves at $100,000, is on the same floor as a similar type condominium that sold for $130,000 a year ago. Tr. 899. In view of the fact that Graves needs only an additional $114,000 above his liquid assets to meet his loan commitment, we do not doubt his ability to secure the necessary funds from his nonliquid assets. Accordingly, the ALJ properly found that Hoffart established that he had sufficient funds to meet his projected costs.

8. Finally, Kaye-Smith contends that Hoffart's application must be denied under the financial issue because Hoffart failed to comply with the hearing order's requirement that he submit contingent financial planning in case his proposed transmitter site remains unavailable. *See* 90 FCC 2d

at 110 n.9. We disagree. At hearing, Hoffart demonstrated that he had set aside a considerable amount of money, $1000 per month, for leasing the proposed transmitter site. This amount, as noted by the ALJ, is 3.3 times that specified in Kaye-Smith's 1980 lease and twice the amount specified in its 1981 lease. *I.d.*, Concl. at para. 3. Thus, it would now appear that Hoffart has ample funds allocated to secure that site or a similar one. And although Hoffart should have provided financial information on his alternative Kaye-Smith site that shortcoming is not fatal to his basic financial qualifications in light of the substantial amount of money he has allocated for a site lease. In sum, we affirm the ALJ's conclusion that Hoffart has demonstrated that he is financially qualified to construct and operate the proposed broadcast facility.

9. *Notarial Imperfections.* A "notarial imperfections" issue was specified against Kaye-Smith by the ALJ on his own motion after receiving material from Kaye-Smith purporting to remedy such imperfections in affidavits supportive of its direct written case. Tr. 140-144. His findings under this issue are set forth in I.D. paras. 93 through 109 and will be highlighted here only to the extent necessary to place Hoffart's exceptions in perspective. The notarial imperfections grew out of Kaye-Smith's efforts to solicit testimonials from Seattle area residents as to Station KISW's performance during its last license period. *I.d*, at para. 94. Lester Smith, executive director of Kaye-Smith, delegated authority to general manager Stephen L. West and program director Eric S. Bogel to work with counsel and to oversee procurement of the testimonials. Counsel informed West that the testimonials required verification by a notary and that each potential affiant was to be advised that his or her sworn letter was intended for use as testimony in a hearing before the Commission. *I.d.*, at para. 95. West, in turn, passed this information to the station personnel specifically recruited for the task of obtaining the letters. Neither West nor Bogel, however, fully comprehended the technical requirements of an affidavit. *I.d.*, at paras. 95-97.

10. All letters received were directed to Margaret Noren, administrative assistant to West, and a notary in the state of Washington, before being forwarded to counsel. *I.d.*, at para. 99. Noren, whose notary experience was limited, had become a notary in order to facilitate station billing, and had never received formal training or taken an examination to become a notary. *I.d.*, at para. 106. Carrie Matthews, another station employee, sometimes acted as a substitute notary for Noren. *I.d.*, at para. 107. Mathews' experience, too, was very limited, and she also had not received training or taken an examination to become a notary. Prior to the mailing of the letters to counsel, West and Noren discovered that five of the letters lacked notarizations. West thereupon instructed Noren to notarize the letters, and she in turn directed Matthews to notarize them.

I.d., at para. 100. None of the three was aware that the letters had to be signed in the presence of a notary. *I.d.*, at paras. 96, 108. The sworn letters were then mailed to counsel and included in Kaye-Smith's direct written case with affidavits from West and Bogel attesting that the letters had been obtained by them or under their direction and that the affiants had been informed that their letter affidavits would be used as testimony before the Commission. *I.d.*, at para 101.

11. A few days after the exhibit exchange date, counsel spoke with West and learned that some of the testimonials had been signed outside the presence of a notary; he instructed West to secure re-executed affidavits from the persons as well as two others whose affidavits lacked the date of notarization. *I.d.*, at para. 101. An effort was then made by station personnel to obtain proper affidavits for those improperly notarized. *I.d.*, at para. 102. Nearly all were subsequently obtained; however, one of the individuals, David Watkins, sent his corrective letter to the station, lacking a notarial seal and signature. Noren spoke by telephone to him about the matter and was instructed by him to affix her signature and seal to the letter, an instruction she carried out. Compounding this shortcoming was the fact that Watkins failed to apprise her that his secretary had affixed his signature to the letter. Noren made one more error and placed her seal on another letter in order to correct an erroneous date on the letter. *I.d.*, at para. 102. The re-executed affidavits were substituted for the previously exchanged improperly notarized affidavits, and it was at that point that the ALJ added the issue. *I.d.*, at para. 103-104. Five of the individuals whose testimonials had been originally deficiently notarized appeared as witnesses and testified that they voluntarily authored their letters; all but two understood that their letters would be used in a Commission hearing although only two recalled actually being told that their letters were to be used at hearing. *Id.*, at para. 109.

12. After observing all of the witnesses and considering their testimony, the ALJ concluded that the notarial imperfections were the result of errors by the station employees assigned to the task of obtaining the letters, that none of the station personnel involved believed that he or she was acting improperly, and that there was no intention to mislead the Commission. *I.d.*, Concl. at para. 5. There was no motive for submitting improperly notarized testimony or for not informing the potential affiants that their letters would be used as evidence because these facts could have been easily ascertained at hearing, and the fact that some potential affiants were not so informed appeared to have been an oversight. *I.d.*, Concl. n. 41. Accordingly, this conduct warranted, at most, no more than a slight demerit against Kaye-Smith. Id., Concl. at para. 5.

13. Hoffart's exceptions pertaining to this issue include a hodgepodge of accusations and allegations which he contends the ALJ failed to

consider. These contentions are summarized as follows: First, Kaye-Smith should be held strictly liable for submitting documents that were in fact erroneous (Hoffart's br. page 20, para. 6; p. 22, para. 12); *Second*, West, Bogel, and Noren gave perjured testimony (br. p. 18, para. 3; p. 19, para 5.); *Third*, West and Bogel submitted false jurats (br. 23, paras. 14, 15); *Fourth*, Noren Knowingly affixed her notary seal and signature to the improperly notarized affidavits after having been warned that the practice was illegal, and she conspired with West to have Matthews illegally notarize other documents (br. p. 19, para 4; p. 21, para 10); and *finally*, station personnel intimidated potential witnesses into not speaking with Hoffart (br. p. 20, para. 8). Kaye-Smith also challenges the ALJ's conclusion under this issue, arguing that no demerit, however slight, should be assessed against it.

14. The exceptions of both parties will be denied. Turning first to Hoffart's exceptions, we have fully considered the profferred supporting documentation underlying each allegation and find that the allegations are unfounded. *First*, the ALJ's finding that the notarial imperfections resulted from error, and not an intent to mislead Hoffart or the Commission, reflects the record evidence; and his conclusion, that Kaye-Smith warrants no more than a slight demerit fully comports with past Commission precedent. *Cf. WIOO, Inc.*, 54 RR 2d 1291, 1304-1305 (1983); *Rocket Radio Inc.*, 65 FCC 2d 589, 595-596. Accordingly, Hoffart's contention that Kaye-Smith must be disqualified because of the mere fact that the material submitted by it contained imperfections is too draconian. *Second*, the charge that West, Bogel and Noren gave perjured testimony is overblown on the part of Hoffart. Perjury generally connotes a knowingly false statement made under oath. Mere mistakes in recollection or isolated incidents of forgetfulness do not rise to this level. Our examination of the specific statements made by the three individuals above (Tr. 344, 605-606, 685-687; 587, 492 and addendum A of Hoffart's exceptions) reveals nothing more serious than that the statements are either at times equivocal or show at most an incorrect recollection on the part of the witness. No adequate basis has been demonstrated by Hoffart to support a finding of culpability in this regard. It is much ado about nothing, and a traditional adversarial attempt to puff those matters into deliberate attempts to deceive. *See Baker Protective Services, Inc.*, FCC 84R-29, released May 3, 1984, para. 19; *Millard Orick*, 89 FCC 2d 571, 572-573, 51 RR 2d 166, (Rev. Bd. 1982).

15. *Third*, the allegation that West and Bogel submitted false jurats was obviously considered by the ALJ when he observed the two as witnesses and concluded that their failure in a few instances to inform affiants of the fact that their testimonial letters would be used in a Commission proceeding, as sworn to by both men on their affidavits,

appears to have been an oversight. I.d., at n. 41. While not condoning the actions of West and Bogel in this regard, we are satisfied that there was no intent to mislead and that the slight demerit assessed against Kaye-Smith by the ALJ under this issue overall is a sufficient sanction. *Fourth*, the claims that Noren knew her actions were improper when she affixed her seal and signature on letters outside the presence of the signatories and that she conspired with West to coerce Matthews to improperly notarize some of the testimonials are based solely on speculation and conjecture. Noren testified that she never checked with counsel to determine whether it was appropriate to affix her seal to the documents outside the presence of letter writer. Tr. 608. In light of the fact that the letter writers testified that they voluntarily prepared their testimonials, which vitiates any discernible motive to improperly notarize the documents, a simple and more plausible explanation for Noren's conduct is that she was unaware of the requirement that the affidavit had to be in her presence when she affixed her seal and signature to the document. Hoffart's claims therefore are rejected. Hoffart also claims that two additional letter writers (John Taylor and Bob Curran) should have appeared at hearing for cross-examination. We agree with the ALJ that the record under this issue was fully developed, and additional testimony would have been merely cumulative. Tr. 780.

16. *Finally*, the accusation that station personnel intimidated potential witnesses into not responding to Hoffart's inquiries is overstated. Intimidation or harassment of witnesses requires threats of reprisals or some other unnecessary and abusive conduct reasonably calculated to dissuade a witness from continuing his or her involvement in a proceeding. *See Chronicle Broadcasting Co.*, 19 FCC 2d 240, 244, 16 RR 2d 1014, 1019 (Rev. Bd. 1969). Here, the record reveals that some of the letter writers contacted station personnel to determine whether they had to respond to Hoffart's letter concerning whether they had personally appeared before Carrie Matthews to have their testimonials notarized. Tr. 659-660, 675-678, 777-778. The callers were simply told by the KISW employees that they did not think it necessary to respond. *Id.* The station employees did not call the letter writers nor did they make any affirmative efforts to prevent the responses to Hoffart. Thus, the behavior described does not rise to the level of intimidation or harassment of witnesses. *See Chronicle Broadcasting Co., supra.* Similarly, we disagree with Kaye-Smith's exception that no demerit under this issue is warranted and with its characterization that only lower echelon and inexperienced staffers were involved in the mistakes. Kaye-Smith's br. at p. 34. It is clear that the station's general manager and program director participated in the errors and that much of the difficulty could have been avoided had those individuals been more attentive. A slight demerit against Kaye-Smith is

fully warranted. *See WIOO, Inc., supra; cf. Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983).

17. *The Comparative Case.* In comparatively evaluating the two applicants, the ALJ correctly observed that it is the Commission's practice in comparative renewal proceedings to accord primary significance to a station's past performance, and that a licensee who has rendered meritorious service can be reasonably confident of renewal. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982); *Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 2d 756 (D.C. Cir. 1983). Kaye-Smith was awarded a strong comparative preference on this factor because Station KISW's past performance during its license term had been meritorious. *I.d.*, Concl. at para. 11. In reaching this conclusion, the ALJ pointed to the licensee's on-going ascertainment of community problems, needs, and interests; its contact with numerous community leaders; its handling of issues of interest to the area through regularly scheduled news, public affairs and other non-entertainment programs and public service announcements; its local production of programs addressed to community problems; and its noteworthy reputation in the community. *I.d.*, Concl. at paras. 10, 11. Moreover, KISW's non-entertainment programming, as shown by its composite week performance, exceeded the amount promised in its earlier filed renewal application. *I.d.*, Concl. at para. 10. Hoffart, in turn, was awarded preferences under the criteria of diversification of control of the media of mass communications and integration of ownership in management, criteria which are ordinarily of primary importance only in initial licensing proceedings. Hoffart's preferences coupled with the slight demerit accruing to Kaye-Smith on the "notarial imperfections" issue, the ALJ ruled, were not sufficient to overcome the substantial preference awarded to KISW for its past broadcast record. *I.d.*, Concl. at para. 12.

18. Hoffart challenges the ALJ's finding that KISW's programming was meritorious, arguing that the percentage of total time KISW devoted to news, public affairs, and other nonentertainment programming (6.61%) during the composite week performance cannot be characterized as meritorious because it only marginally meets the Commission's minimally acceptable level. Hoffart's Br. p. 30, para. 27. Moreover, the station's public service programming was allegedly confined to the early morning hours of Saturday and Sunday when the audience was small. Br. p. 31, para. 29. Finally, Hoffart contends that the ALJ erred in not receiving Hoffart's proffered Exhibit 12 into evidence since it shows that he proposed 8.88% non-entertainment programming per week, and his

proposal would be "meritoriously better" than KISW's past record and its proposal for future operations. Br. p.31, para. 30.

19. We agree with the ALJ that Kaye-Smith is entitled to a strong preference for the past broadcast record of Station KISW, a record we would characterize as substantial. The Commission has held that a "substantial record which is sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal gives rise to a 'renewal expectancy' which, in turn, warrants a preference in comparative renewal proceedings . . . ." *Radio Station WABZ, Inc.*, supra at 90 FCC 2d 839-840. Here, we disagree with Hoffart's contention that the total percentage of non-entertainment programming aired by KISW is too low to give rise to this renewal expectancy. Mere percentages alone are a questionable means of determining a licensee's performance. *See Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1169, 53 RR 2d 805, 810 (Rev. Bd. 1983), modified on another ground, FCC 84-99, para. 3, released March 20, 1984; see also the Commission's full discussion of the questionable nature of relying on "numerical standards" or "numbers games" in *Deregulation of Radio*, 84 FCC 2d 968, 985-991 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ* v. *F.C.C.*, 707 F.2d 1413 (D.C. Cir. 1983). A station's past performance can be demonstrated by a substantial and solid showing reasonably related to service above and beyond what would be considered minimal. 93 FCC 2d at 1166; 53 RR 2d at 809. For as the Court noted in *Stone* v. *FCC*, 466 F.2d 316, 328 n.44 (D.C. Cir. 1972), the needs of a broadcast station's audience "includes a spectrum of events that range from newsworthy to purely aesthetic . . . the broad range of human activity that includes family, art and social interaction." And here, the ALJ's detailed findings of fact, paras. 25 through 61, highlighted in paras. 10-11 of his conclusions, reflect that Kaye-Smith made the type of showing contemplated by the Commission and the Court. In this regard, we particularly note the testimonials received from various community leaders attesting to the high quality of service provided to the community by the station which corroborate the ALJ's findings of actual performance. *See Big Bend Broadcasters*, FCC 83R-103, released December 30, 1983, para. 11.

20. Hoffart's second contention that the station's public service programs are aired when the audience is small or nonexistent is not supported by the record. Station KISW broadcasts an entertainment format of album-oriented rock music aimed primarily at listeners in the 12-30 age bracket, I.D., para. 25. and the record established that Saturday and Sunday mornings, during which time KISW presents blocks of public service programming, are ideally suited to its audience because that age group is not at work or school, and the severity of competition from other

broadcast stations is less during those hours. I.D., at para. 28. We note, too, that KISW conducted surveys and found that heavy weekend listening habits of the station's targeted audience occurred during the early morning weekend time period. *Id.* This is corroborated by the fact that station KISW's second highest advertising rate is for the time purchased on Saturday and Sunday from 5:00 a.m.-9:00 a.m. *I.D.*, at para. 29. Thus, there is no basis for a finding that KISW relegates its public service programming to nondesirable hours. Finally, Hoffart has shown no error on the part of the ALJ in not receiving Hoffart's Exhibit 12 into evidence. The exhibit entitled — "Ascertainment/Programming" — was rejected because it was outside the scope of the issues. Tr. 882-883. Hoffart never requested a comparative programming issue, and the slight difference between his proposal of nonentertainment programming and that aired by Station KISW, 8.88% v. 6.61%, would not, in any event, have been sufficient to support addition of an issue. *See Mel-Lin, Inc.*, 48 FCC 2d 1207, 1209, 31 RR 2d 819, 823 (Rev. Bd. 1974). *West Michigan Broadcasting Co.* v. *FCC*, D.C. Cir. May 25, 1984, Slip Op. p. 7. (Commission considers only "substantial differences between applicants' proposed program plans.") In sum, we perceive no basis for disturbing the ALJ's award of a substantial preference to Kaye-Smith for the broadcast performance of Station KISW during its last license term.

21. Hoffart's exceptions also include some allegations of error that do not fit precisely under the designated issues. The only exception of significance is a false jurat claim against Lester Smith predicated on his November 9, 1982 affidavit attached to Kaye-Smith Exhibit 15 attesting to the fact that he had read the exhibit and that it was true and correct to the best of his knowledge. The exhibit contains an affidavit of Anthony Kelsey that was notarized on November 10, 1982, one day after Smith had allegedly read the exhibit. This matter was thoroughly explored by the ALJ, Tr. 187-193. There is no need for us to dwell on it further except to say that the record establishes that Smith was aware of the contents of the Kelsey affidavit when he signed his own affidavit, that he signed it on advice of counsel, and that there was no intent to mislead. The remaining exceptions make cryptic references to the record and request some type of sanction against Kaye-Smith; however, as we recently stated in *Mad River Broadcasting Co., Inc.*, FCC 84R-36, released May 18, 1984, at n.2, the "proper vehicle for allegations of misconduct is a timely motion to enlarge issues, see 47 CFR 1.229, accompanied by requisite supporting documentation, on the basis of which allegations can be carefully evaluated." The sparseness of the supporting documentation precludes serious consideration here of the alleged misconduct.

22. *Petitions for Further Hearings.* On December 14, 1983, Hoffart filed his first petition requesting the addition of twenty-four issues

against Kaye-Smith. The petition will be denied. In large part, the request issues are simply a reiteration of Hoffart's allegations contained in his exceptions, and need not be addressed again. To the extent that new matter is raised, Hoffart has failed to make the requisite showing for reopening the record: the petition must be supported by newly discovered evidence; the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of the hearing; and the new evidence must, if true, affect a basic part of the decision. *See The News-Sun Broadcasting Co..*, 27 FCC 2d 61, 20 RR 2d 1084 (1971). Here, the underlying facts were known to Hoffart at the time of the hearing in December 1982. It is impermissible for an applicant to "sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." *Colorado Radio Corp.* v. *FCC* 118 F2d 24, 26 (D.C. Cir. 1941).

23. Hoffart filed a second petition for enlargement of issues on April 26, 1984, based on the purported failure of Kaye-Smith to advise the Commission of the filing and grant of a modification to its antenna system at KISW. This request, too, will be denied since there has been no showing that the unreported facts are of decisional significance, that an intent to conceal is present, or that a pattern of carelessness or inattentiveness is exhibited. *See Merrimack Valley Broadcasters, Inc., supra.*

24. Finally, on May 18, 1984, six days before our decision was due (see Section 0.362(b) of the Commission's Rules), Hoffart filed his third petition, predicated on a newspaper article reporting an apology by Station KISW following the broadcast of a live interview that was the subject of a number of calls disturbed by its graphic sexual language. Hoffart contends that the programming of offensive material is a matter of decisional significance and should have been timely reported by Kaye-Smith. He urges addition of a reporting issue. We will deny Hoffart's request. Although we have delayed the release of this Decision pending Kaye-Smith's responsive pleading to ensure a complete review of this matter, Hoffart's request is defective on it face. Putting aside the initial procedural shortcoming that the allegation is based on a newspaper article, which is hearsay and ordinarily insufficient to support enlargement of the issues under Section 1.229(c) of the Commission's rules, *see Jimmie H. Howell*, 46 FCC 2d 50, 57-58, 29 RR 2d 1317, 1326-27 (Rev. Bd. 1974), the article itself reports that the interview was live; that it was discontinued when the interviewer would not modify his language; and that a taped apology of the interviewee was subsequently repeatedly broadcast over the station. Thus, the station acted responsibly in taking corrective measures, and the interview was not a matter of decisional

significance. See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 733 n.7 (1978); and *WGBH Education Foundation*, 68 FCC 2d 1250, 1254-55 (1978). *Contrast Trustees of the University of Penn; WXPN(FM)*, 69 FCC 2D 1394 (1978) and 57 FCC 2d 782 (1975). There was no obligation on the station to report this matter; thus, a Section 1.65 issue has not been raised. *See Merrimack Valley Broadcasters, Inc., supra.*

25. Kaye-Smith excepts to the ALJ's failure to add issues against Hoffart involving abuse of process, the fair break doctrine, public inspection file, program matters, and site availability. FCC 82M-2927, released September 23, 1982. In light of our conclusion that Hoffart is not the comparative winner, we need not rule on the merits of this exception. See para. 26, below.

26. *Summation.* In *Cowles Broadcasting Inc.* v. *FCC*, 683 F.2d 503, at 507 n. 16 (D.C. 1982), the Court indicated that in making a comparative choice between applicants in this type of case, relevant factors "are all to be weighed, all at once, all with an eye toward the public interest. Nothing is to be removed from the scales until the final balance is struck." Our review of the ALJ's conclusions in this case, *I.d.*, Concl. at paras. 7-12, indicates that the ALJ has carried out the Court's directive, and that in doing so, he also correctly applied controlling Commission policy. We therefore affirm the ALJ's holding that the preferences accorded Hoffart coupled with the slight demerit accruing to Kaye-Smith are not sufficient to overcome the substantial preference awarded to Kaye-Smith for its past broadcast record.

27. ACCORDINGLY, IT IS ORDERED, That the application of Kaye-Smith Enterprises (File No. BRH-801001UZ) for renewal of license for Station KISW, Seattle, Washington IS GRANTED, and the application of Hoffart Broadcasting (File No. BPH-801229AE) IS DENIED.; and

28. IT IS FURTHER ORDERED, That the petitions to enlarge issues and add issue request filed by Hoffart Broadcasting on December 14, 1983, and April 26 and May 18, 1984, respectively, ARE DENIED; that Hoffart's Supplemental Discovery Request filed May 18, 1984 IS DENIED; that Hoffart's waiver to exceed page limits, filed January 9, 1984 IS GRANTED; that the petitions for leave to amend filed December 1 and 27, 1983, and March 1, April 18, and May 31, 1984, by Kaye-Smith Enterprises, ARE GRANTED, and the amendments ARE ACCEPTED; and that the petition for expedited handling, filed January 16, 1984, by Kaye-Smith IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
Dena Pictures, Incorporated And Alexander Broadcasting Company, A Joint Venture d/b/a Kaye-Smith Enterprises	BC Docket NO. 82-265 File No. BRH-801001UZ
For Renewal of License of Station KISW(FM), Seattle, Washington	
Vincent L. Hoffart d/b/a Hoffart Broadcasting Seattle, Washington	BC Docket NO. 82-266 File No. BPH-801229AE
For Construction Permit	

Appearances

Jerome S. Boros and *Stuart Young* on behalf of Kaye-Smith Enterprises; *Vincent L. Hoffart, pro se* and *Daniel Sarno* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission

INITIAL DECISION
OF
ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE
THOMAS B. FITZPATRICK

Issued: November 18, 1983; Released: November 25, 1983

Preliminary Statement

1. This proceeding involves the application of Dena Pictures, Incorporated and Alexander Broadcasting Company, a joint venture d/b/a Kaye-Smith Enterprises (Kaye-Smith) for renewal of license to operate Station KISW(FM), Seattle, Washington on Channel 260, and the mutually exclusive construction permit application of Vincent L. Hoffart d/b/a Hoffart Broadcasting (Hoffart) for the KISW(FM) facility.

2. By *Memorandum Opinion and Order*, released June 1, 1982, 90 FCC 2d 105 (*Designation Order*), the Commission consolidated the Kaye-Smith and Hoffart applications for hearing on the following issues (*Designation Order*, para. 20):

> To determine whether Hoffart Broadcasting is financially qualified to construct and operate the proposed station.

> To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

While the *Designation Order* did not allocate the burden of proof with respect to the financial issue, Section 1.254 of the Commission's Rules, 47 CFR 1.254, makes clear that the burden of proof is on Hoffart.[1]

3. The applicants, in accordance with the Presiding Judge's *Order*, exchanged their direct written cases on November 12, 1982.[2] Thereafter, prior to hearing, Kaye-Smith directed letters to the Presiding Judge and the parties, dated November 23, 1982 and November 24, 1982, calling attention to "notarial imperfections" in certain affidavits supportive of Kaye-Smith's exchanged exhibits. Each letter enclosed corrective affidavits. At the outset of the hearing, the Presiding Judge issued a bench ruling, which added the following issue pertaining to Kaye-Smith to the proceeding (TR 141-144):

> To determine all of the facts and circumstances surrounding the so-called notarial imperfections relative to the direct written case of Kaye-Smith and what impact, if any, whatever evidence is adduced will have on the basic and/or comparative qualifications of Kaye-Smith to continue to be a broadcast licensee.

The burden of going forward with the introduction of evidence and the burden of proof with respect to this issue were placed upon Kaye-Smith. (TR 138-141)

4. A prehearing conference was held in Washington, D. C. on August 6, 1982. (TR 1-133) Hearing was held in Seattle, Washington from November 30 to December 3, 1982, inclusive. (TR 134-1022) The record was closed on December 14, 1982 by *Order* (FCC 82-3971), released December 14, 1982. The applicants filed Proposed Findings of Fact and Conclusions of Law on February 14, 1983. Hoffart filed Reply Findings on March 3, 1983, Kaye-Smith and the Mass Media Bureau (Bureau)[3] filed Reply Findings on March 11, 1983.

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[1] 47 CFR 1.254, in pertinent part, provides: "... [Both] the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation."

[2] The applicants had been cautioned that each direct case exhibit must be accompanied by the affidavit of the sponsoring witness. *Order Prior to Prehearing Conference* (FCC 82M-1866), released June 15, 1982. The Presiding Judge, during the August 16, 1982 prehearing conference, emphasized the direct testimony of community leaders and members of the public should show on its face that it is sworn testimony being submitted in a docketed Commission proceeding. The Presiding Judge stressed that those individuals should be made aware that they were subject to being called for cross-examination. (TR 106-107)

[3] The Bureau did not file proposed findings of fact and conclusions of law.

Findings of Fact

A. The Comparative Issue

5. As noted, *supra*, this proceeding involves the application of Kaye-Smith for renewal of its license to operate Station KISW(FM), Seattle and the competing application of Hoffart for a construction permit to establish a new FM broadcast station in Seattle, utilizing the frequency currently held by Station KISW(FM).

(1) The Community and Area To Be Served

6. Seattle is located on Puget Sound, an inland water body connected to the Pacific Ocean. Greater Seattle is a major metropolitan area. In fact, it is the largest urban area north of San Francisco and west of the Rocky Mountains. Seattle has a population of 494,000. It is located in King County, which has a population of 1,270,000. Adjacent are Pierce County, with a population of 486,000, and Snohomish County with a population of 337,000. Together, the three counties include over 2,000,000 people, or approximately one half the population of the State of Washington. Among the principal communities in the greater Seattle area are: Auburn, Bellevue, Bothell, Bremerton, Edmonds, Everett, Kent, Kirkland, Lynwood, Mercer Island, Puyallup, Redmond, Renton, and Tacoma. (Hoffart Ex. 19, pp. 1-4, 20; TR 881)

(2) Kaye-Smith

(a) Ownership and Management

7. Kaye-Smith is a joint venture composed of Dena Pictures, Incorporated (Dena), and Alexander Broadcasting Company (Alexander), which, respectively, have eighty percent and twenty percent interests in Kaye-Smith. Dena is owned in equal parts by Danny Kaye and Sylvia Fine Kaye. Alexander is owned by Lester M. Smith. (Kaye-Smith Ex. 1, p. 1; TR 168)

8. The officers and directors of Dena are (Kaye-Smith Ex. 21):[4]

Danny Kaye	– President & Director
Sylvia Fine Kaye	– Secretary, Treasurer & Director
Herbert Bonis	– Vice-President & Director
Julius Lefkowitz	– Vice president

9. The officers and directors of Alexander are:

Lester M. Smith	– President, Treasurer & Director
Bernice R. Smith	– Vice-President & Director
William A. Palmer	– Secretary & Director
Irvin H. Karl	– Assistant Secretary & Director

[4] By *Order* (FCC 82M-3971), released December 14, 1982, Kaye-Smith Exs. 20 and 21 were received in evidence.

10. *Lester M. Smith* is Executive Director of Kaye-Smith. In that capacity, he is chief executive officer and chief operating officer of Kaye-Smith. (Kaye-Smith Ex. 2, pp. 1-7; TR 175)

11. Danny Kaye and Sylvia Fine Kaye did not devote any time to the operation of Station KISW(FM) during the renewal period (February 1, 1978 to January 31, 1981) and do not propose to devote any time in the event the renewal application is granted. (Kaye-Smith Exs. 1 and 3; TR 232)

12. During the license period, Smith directly superintended the operations of Station KISW, with the Station's General Manager reporting to him. Among other things, Smith made all policy decisions concerning the Station and he exercised ultimate managerial authority over the programming and operation of the station. In the future, Smith will continue to be integrated into the operation of Station KISW on a day-to-day basis. As Executive Director of Kaye-Smith, Smith will make the ultimate decisions with respect to all facets of station operation, including programming, sales, and general administration, which, without limitation, embraces supervision of the station's technical facilities, civic activities, and compliance with law and regulation. Smith will devote thirty hours a week to these duties. (Kaye-Smith Ex. 1, p. 1; Kaye-Smith Ex. 3, p. 1; TR 168, 178, 231-232, 251-253, 338-339)

13. Smith has lived in Bellevue, a Seattle suburb, since 1973, with his wife, Bernice. As noted, *supra*, Mrs. Smith is a director and officer of Alexander Broadcasting Company. (Kaye-Smith Ex. 2, p. 6)

14. Smith is a graduate of New York University. Upon graduation in 1940, Smith worked as an NBC page until he was inducted into the U.S. Army in January 1942. Smith was commissioned a Second Lieutenant in July 1942. He served in North Africa, Italy and France. He received the Bronze Star and other decorations and was discharged in March 1946 with the rank of Major. he served in the California National Guard and Reserves until 1951.

15. Except for a period from 1948 to 1954 when Smith was in real estate, insurance and media brokerage, Smith's post-war occupation has been broadcasting. In 1946, he joined KYA, San Francisco, as a salesman; he was promoted to sales manager. In December 1954, December 1955 and March 1957, he successively acquired a 50% interest in Stations KJR, Seattle, Washington; KXL, Portland, Oregon; and KJRB (then KNEW), Spokane, Washington. He also had a 50% interest in KHMO, Hannibal, Missouri from 1955 to 1957. (Kaye-Smith Ex. 2)

16. In July 1958, Smith and an associate sold their interests in the Seattle, Portland and Spokane radio stations to corporations owned by Frank Sinatra and Danny and Sylvia Kaye, respectively. Smith continued to manage these stations until 1964, when he joined with Danny Kaye and

his wife to purchase Sinatra's interest in the stations. Smith became Executive Director of the licensee which, in the sixties, changed its name to Kaye-Smith. During the sixties, Kaye-Smith acquired Stations KISW-FM, Seattle; KXL-FM, Portland; WUBE AM/FM, Cincinnati; and KCKN AM/FM, Spokane. In 1980-1981 Kaye-Smith sold KJR, WUBE AM/FM and KCKN AM/FM. (Kaye-Smith Ex. 2)

17. Presently, Kaye-Smith is the licensee of KXL-AM and KXL-FM, Portland, Oregon. Portland is about 142 miles south of Seattle. Station KXL-AM operates on 750 kHz with 50K daytime and 1KW at night. Station KXL-FM is a class C FM station, operating with 100KW ERP, (H&V) from Councel Crest. Kaye-Smith also is licensee of Stations KJRB, AM and KEZE-FM, Spokane, Washington. Spokane is about 237 miles east of Seattle. Station KJRB is a 5KW fulltime regional station on 790 kHz and KEZE-FM currently operates with 41 KW, ERP and has an application pending to increase power to 100KW ERP (H&V) at a height above average terrain of 1910 feet. (Kaye-Smith Ex. 18; TR 244-253)

18. In the sixties Kaye-Smith expanded into other businesses serving the public. Concerts West, a concert operation, was established on October 1, 1968, and grew to international stature. It was sold to its employees in 1977.[5] In 1971, Marine Center was established; it sold accessories and supplies for pleasure boating at retail and through mail order, until Kaye-Smith sold the business to its employees in 1974. A MUZAK franchise in Cincinnati was acquired in 1967 and sold in 1981. (Kaye-Smith Ex. 2)

19. With Danny Kaye and other Seattle businessmen, Smith received the American League Baseball Franchise for Seattle in 1976. Smith was managing partner of the club, the Mariners, in its early development. The team was sold in 1981 with Smith and Kaye retaining minor interests. Smith was a partner in the Seattle soccer team, the Sounders, from 1973 to 1979. (*Id.*)

20. In 1970 Kaye-Smith Productions was organized to record and produce radio and television commercials in Seattle. The business developed into the recording of music and the production of audio-visual, film and video presentations for industrial, commercial and non-profit organizations. Kaye-Smith Productions presently is the largest company of its kind in the Pacific Northwest. (*Id.*)

21. Smith has been Chairman of the Board (1967-1968) and a long time director of the Radio Advertising Bureau. He presently is Chairman of its Advisory Committee. He served on the board of the National Association of Broadcasters, representing Oregon and Washington from 1967 to 1969. Smith was an officer and board member of the Oregon Association of

[5] It was mistakenly reported in the renewal application that Concert West was still owned by the licensee. (TR 223-224)

Broadcasters for a number of years, becoming president in 1966. He has served on the board of the Association for Broadcast Standards and the All Industry Radio Music License Committee. Smith has been a consultant to the Department of Defense on the usage of equipment and programming for AFRTS, overseas ratio stations. He has been a guest lecturer on broadcasting for the Practicing Law Institute. He is a member of the Broadcast Pioneers, and International Radio and Television Society. (*Id.*)

22. Smith is a member of Rotary Club in Seattle and its classification and membership committee. He has been a member of the board and of the executive committee of the Seattle Chamber of Commerce, and has been a board member of the Seattle King County Convention and Tourist Association, and the Seattle Symphony. He is a member of the Rainier Club, Washington Athletic Club, Bellevue Athletic Club and the Overlake Golf and Country Club, all Seattle area organizations. (Kaye-Smith Ex. 2)

(b) Station KISW(FM) Facilities

23. During the license period[6], Station KISW(FM) broadcast with maximum power of 100 kw ERP, utilizing a translator to improve reception. Station KISW(FM) maintained (Kaye-Smith Ex. 6, p. 1; TR 543):

(i) Separate studios for live broadcast and production of news and recorded programming, each fully-equipped;

(ii) Remote broadcast equipment for live, on-the-scene broadcasting;

(iii) General offices for the general manager and program director and the Sales, Traffic and Public Affairs Departments. Also, an engineering workshop for servicing equipment.

24. In its operation, Station KISW(FM) utilized the following programming aids (Kaye-Smith Ex. 6, p. 1; TR 543):

(i) Associated Press news, wire and audio services;

(ii) NBC's FM network, "The Source" from September to December 1979;

(iii) Burkhart/Abrams programming consultants who were retained from January 25, 1979 to January 31, 1981, inclusive, to advise on effective programming; and

(iv) The Arbitron Radio bi-annual audience surveys in order to gauge the success of programming among various segments of the potential listening audience.

(c) Programming of Station KISW(FM) During the License Period (February 1, 1978 - January 31, 1981)

25. Station KISW operated 7 days a week, 24 hours a day, except for maintenance early Monday mornings. It broadcast an entertainment format of "album-oriented" rock music, aimed primarily at listeners in the 12-30 age bracket. Within this format, the radio personalities presented a blend of full-length album cuts by current and classic rock artists, news and information of the "rock world", recordings of live performances and

[6] As noted, *supra*, the license period was from February 1, 1978 to January 31, 1981.

concerts by both nationally prominent and local bands, and various music specials featuring one or more albums by a recording artist, each played in its entirety. This non-entertainment programming was geared particularly to Station KISW's youthful audience. (Kaye-Smith Ex. 8, pp. 1-2; TR 197, 204, 291, 293, 546, 548)

26. During the license period, Station KISW, in an effort to be aware of problems, needs and interests of Seattle and the surrounding area, conducted interviews with 280 community leaders[7] (Kaye-Smith Ex. 10, pp. 2-3; TR 278-279, 499-502, 548); a random survey of the general public, and relied upon management's perception of issues of local concern derived from community involvement.

27. During the composite week, Kaye-Smith exceeded each of the programming proposals set out in the prior renewal application. Station KISW broadcast a total of 668 minutes of programming logged as "news," "public affairs" and "other non-entertainment". This exceeded by more than one hour per week the renewal proposal. (Kaye-Smith Exs. 10, p. 1, 11, p. 1; TR 183, 548)

Category	*Minutes*		*Percent of Total Time*	
	Previously Proposed	*Composite Week Performance*	*Previously Proposed*	*Composite Week Performance*
News	242	278	2.4%	2.78%
Public Affairs	141	167	1.4%	1.65%
Other Non-Entertainment	222	223	2.2%	2.21%
Total	605	668	6.0%	6.61%
	Number			
Public Service Announcements	150	152		

28. Station KISW presented blocks of public service programming in the Saturday morning 6:00 a.m. - 8:30 a.m. and Sunday morning 6:00 a.m. - 9:00 a.m. time periods, which are periods of actual radio listenerships in the Seattle area. Lester Smith explained that a large number of people rise early on Saturdays and Sundays in preparation for a day's boating, skiing, camping or hiking. He explained that the Saturday and Sunday morning hours are ideally suited to public service programming because those in the 18 to 24 age bracket are off from work or school; Station KISW(FM) doesn't face television competition and the severity of radio competition is less at these hours. (TR 196) Stated another way, the typical Seattle weekend listener has more leisure time to listen to long blocks of informational programming than during the work week. (Kaye-Smith Ex. 10, pp. 1-2; TR 196-200, 240-241, 274-277, 295-297, 397-398, 477-481, 548)

[7] Fifteen percent of the leaders were members of minority groups and thirty percent were women.

Surveys conducted by Station KISW during the license period confirmed that heavy weekend listening habits, especially of the station's targeted audience (18 - 24 years of age), occurred during the early morning weekend time periods. (Kaye-Smith Ex. 15)[8]

29. Station KISW's advertising rate structure during the license period set the station's second highest rate (fully ninety percent of the station's highest rate) for time purchased on Saturday and Sunday 5:00 a.m.-9:00 a.m. This rate structure represents Kaye-Smith's business judgment that these slots were desirable time periods in which to reach listeners. This contrasts with the 1:00 a.m. - 5:00 a.m. Monday - Sunday period, where only thirty percent of the highest rate was charged. (Kaye-Smith Ex. 10, pp. 1-2; TR 296-297, 548)

30. During the renewal period, Station KISW regularly broadcast the following locally-produced, audience-participation public affairs program series. (Kaye-Smith Ex. 10, pp. 3-28; TR 398-414, 548):

Saturday Morning Live - a live two or two-and-a-half hour interview/talk program, produced by Station KISW and broadcast throughout the license period on Saturday mornings from 6:00 a.m. to 8:00 a.m. or 8:30 a.m. The program featured a moderator who solicited listeners to call the station to discuss the day's topics, namely, issues of local or national importance, with the station's in-studio guests;

Sixty Seconds - a one-minute interview program, produced by Station KISW, broadcast five times daily Monday through Friday (at approximately 1:00 a.m., 5:00 a.m., 10:00 a.m., 3:00 p.m. and 8:00 p.m.), which solicited the views of Seattle area community members on matters of local and national interest. Excerpts of about eight to ten "man on the street" type interviews were included in each program. The broadcast ended with a solicitation for contrary views from members of the public. During the license period, *Sixty Seconds* ran from February 1978 to August 1978 and from September 1979 to January 1981.

31. Other locally-produced, non-entertainment program series broadcast included (Kaye-Smith Ex. 10, pp. 3-6; TR 398-414, 548):

Concert Calendar - a live one-minute report of upcoming concerts which was broadcast seven days a week, six times daily during all dayparts, throughout the license period;

Ski Report - a live program broadcast seven days a week from November through March during each year of the license period. This program was a one-minute broadcast and was carried three times daily on week-days (at approximately 7:10 a.m., 9:10 a.m. and 4:10 p.m.) and twice daily on weekends (at approximately 7:10 a.m. and 9:10 a.m.);

What's Happening - a two-minute rundown of upcoming local civic and other events. This program was broadcast three times each day on Thursday, Friday and Saturday

[8] Smith executed his affidavit attesting to the correctness of Kaye-Smith Ex. 15 on November 9, 1982. This exhibit contains an affidavit of A. Anthony Kelsey executed on November 10, 1982. Smith explained that he had read the exhibit, before attesting to its correctness. The context of the Kelsey affidavit was read to Smith over the phone before he, Smith, signed the affidavit. He explained that counsel advised him that it was appropriate to proceed in this fashion. (TR 188-191)

(at approximately 12:56 p.m., 3:56 p.m. and 6:56 p.m.) during each week of the license period.

32. Other non-entertainment program series aired included (Kaye-Smith Ex. 10, pp. 3-28; TR 398-414, 548):

Alan Watts - a forty-five minute recorded program, broadcast on Sunday mornings, which explored the problems and choices facing today's youth, including consequences of choosing an "alternative" life-style. The program dealt extensively with personal growth and the achievement of inner peace. Between June 1979 and February 1980, it was aired from 7:00 a.m. to 7:45 a.m.; and between March 1980 and January 1981 from 6:00 a.m. to 6:45 a.m.;

Inner-View - a recorded one-hour program, broadcast on Sunday mornings from 7:30 a.m. to 8:30 a.m., from March 1980 to the end of the license period. This program explored the social, moral, political and economic issues relevant to Station KISW's young primary demographic audience. About twenty percent of each program provided an interview forum for discussion of a performing artist's views on important issues of the day. The other eighty percent of the program was devoted to the artist's music. *Inner-View* won the 1978 Billboard Radio Forum Award;

Jonathan Field & Friends - a two-hour recorded program broadcast Sunday mornings from 7:00 a.m. to 9:00 a.m. between February 1978 and June 1979, after which it was a one hour program. This program dealt with different social or political subjects each week through commentary, documentary and interview materials intermingled with the lyrics and themes of correlative contemporary music;

Reality - a one-hour recorded program produced by Youth Development of San Diego and broadcast on Sunday mornings from 6:00 a.m. to 7:00 a.m., from January 1979 to January 1980. *Reality* dealt with a wide-range of contemporary religious issues covering different denominations. Tying the religious message to the everyday life of the young adult, *Reality* addressed subjects such as the moral issues involved in war;

The Robert Klein Hour - a one-hour recorded program broadcast on Sunday mornings from 8:00 a.m. to 9:00 a.m., from January 1979 to February 1980[9], featuring interviews with contemporary leaders from the political and entertainment spheres;

Rock and Religion - a recorded program broadcast on Sunday mornings from 7:00 a.m. to 7:30 a.m. from February 1980 to January 1981. The program consisted of a discussion of contemporary religious issues with rock stars, highlighted by a twelve-part *History of Rock and Religion.*

33. Station KISW's public affairs and other programming, particularly the locally produced *Saturday Morning Live* and *Sixty Seconds* programs and the *Jonathan Field & Friends* recorded program addressed the problem of drugs, the economy, education, environment, the elderly, energy, health, law enforcement, child rearing, morality, quality of life, taxes and women's issues. This is best illustrated by the listing set forth, *infra*, as to the dates these problems were addressed on these programs (Kaye-Smith Ex. 10, pp. 11-28):

[9] However, note, *supra*, that it was represented that the *Jonathan Field & Friends* program was broadcast from 7 to 9 a.m. during the period February 1978 and June 1979.

Saturday Morning Live - Child bearing/child raising (3/17/78, 5/9/78, 5/26/79 and 4/19/80); community growth/housing (4/25/80); economy (6/7/80); education (5/31/80); elderly (5/5/79, 7/28/79); energy (5/3/78, 8/21/79, 9/1/79, 5/24/80, 7/5/80); environment (3/15/80, 3/22/80, 6/21/80); health (11/18/78, 11/25/78, 1/27/79, 4/21/79, 6/16/79, 7/7/79, 8/25/79, 4/12/80); law enforcement/government (5/22/78, 6/10/78, 12/16/78, 2/10/79, 1/19/80, 2/2/80); drugs (4/29/78, 12/9/78, 2/24/79); quality of life (4/22/78, 6/3/78, 10/28/78, 11/4/78, 12/2/78, 1/20/79, 4/14/79, 5/12/79, 6/9/79, 6/30/79, 8/11/79, 8/25/79); taxes (4/14/79); women's issues (1/13/79, 3/31/79, 9/15/79)

Sixty Seconds - Community growth/housing (3/10-14/80, 3/17-21/80, 5/12-16/80, 8/4-8/80); economy (7/7-11/80); education (2/20/78, 6/1/78, 6/14/78, 6/20/78, 7/10/78; 9/1-5/80); energy (2/25/78, 6/1/78, 6/2/78, 6/11/78, 6/19/78, 6/25/78, 2/4-8/80, 3/17-21/80, 6/16-20/80); environment (4/14-18/80, 5/26-30/80); health (6/13/78, 8/9/78, 3/24-28/80, 5/19-23/80, 5/26-31/80, 6/30-7/4/80); law enforcement/government (2/18/78, 3/8/78, 3/28/78, 5/1/78, 6/12/78, 6/13/78, 6/15/78, 8/7/78, 8/9/78, 9/17/78, 1/21-25/80, 2/4-8/80, 3/3-7/80, 3/10-14/80); drugs (4/3/78, 6/12/78, 7/8/78); morality (3/13/78, 5/10/78, 6/1/78, 6/5/78, 7/8/78, 7/20/78, 8/3/78); quality of life (2/17/78, 3/25/78, 5/7/78, 6/10/78, 6/12/78, 6/18/78, 6/20/78, 7/14/78); taxes (6/2/78, 6/5/78, 6/10/78, 6/17/78, 7/13/78)

Jonathan Fields & Friends - child bearing/child raising (6/4/78); community growth/housing (3/5/78, 8/6/78, 3/11/79); economy (9/10/78, 12/17/78); education (2/5/78, 7/2/78, 7/23/78); elderly (8/27/78); energy (10/15/78, 11/5/78, 11/12/78, 11/19/78); health (3/26/78, 5/14/78, 6/11/78, 7/16/78, 2/11/79, 2/25/79, 4/29/79); law enforcement/government (5/7/78, 5/28/78, 9/17/78, 12/3/78, 1/7/79, 2/4/79, 4/8/79); drugs (2/19/78, 7/30/78, 10/8/78, 12/10/78); morality (2/26/78, 7/9/78); women's issues (4/23/78, 2/18/79)

Reality - economy (3/23/80); education (8/12/79, 11/11/79); health (3/25/79, 1/13/80)

34. A number of other *Jonathan Field & Friends* programs and many of the *Reality* programs addressed religious, political and sociological subjects. (Kaye-Smith Ex. 10, pp. 28-32) In addition, Station KISW locally produced two major Christmas specials during the license period. Each was a twelve-hour, live historical retrospective. *Roots of Rock*, aired on Christmas 1978, covered the history and music of the years 1962 to 1978. *Ten Years Gone*, aired on Christmas 1979, interspersed documentary narrative with musical tracks, and covered historical, political and musical events from 1969 to 1979. (Kaye-Smith Ex. 10, pp. 28; TR 548)

35. Throughout the license period, Station KISW broadcast public service announcements (PSAs) seven days a week in all dayparts on behalf of numerous local charitable, civic and service organizations. During the composite week, 152 PSAs were broadcast. Kaye-Smith put into evidence a sampling of PSA topics, consisting of 435 different topics, correlated to the public service organizations on whose behalf the PSAs were broadcast. The PSAs addressed a wide range of local events and activities which generally corresponded with ascertained needs. The PSAs topics were categorized by the station as follows:

- Charities
- Civic Organizations
- Consumer Services
- Crime
- Culture
- Ecology/Conservation
- Economy
- Education
- Elderly
- Government
- Health
- Highway Safety
- Military
- Public Safety
- Recreation
- Unemployment
- Women
- Youth
- Miscellaneous

(Kaye-Smith Exs. 10, pp. 3, 34-62; 11, p. 1; TR 183, 280-281, 414, 548)

36. Station KISW supplemented its PSA service by providing on-air promotion and coverage as well as off-air promotion and sponsorship to various educational and fundraising events on behalf of local organizations, including (Kaye-Smith Ex. 13, pp. 1-2; TR 549):

Boy Scouts of America "Exploring" Program - Station KISW's air personalities and non-air staff regularly spoke to local high school and college students about careers in broadcasting. These educational talks were arranged through the Boy Scouts' career program, "Exploring." Students of the following local high schools and colleges were among those which benefited from the Station KISW talks during the licensed period:

— Bothell High School

— Highline Community College

— Ingraham High School

— Meadowdale High School

— Queen Anne High School

— University of Washington

Muscular Dystrophy Association - During July 1980, Station KISW, in conjunction with local Seven Eleven stores, created and promoted the now annual "Bedrace" for the benefit of the local chapter of MDA. Station KISW personnel also participated in this series of races which extended over several weekends. The finals took place at a Seattle Seahawks Football game half-time before more than 60,000 people in the Seattle Kingdom Stadium

Seattle Area Food Banks - For several weeks during November 1979 and again in November 1980, Station KISW aired announcements encouraging concert-goers to donate cans of food to the Food Banks, an agency serving needy families in the Seattle area. Bins were placed in Seattle area concert halls and several hundred cans were collected both years.

In addition, as part of the 1980 campaign, the station promoted, on air, the sale of Station KISW bumper stickers at 25¢ each, with the proceeds going to buy Thanksgiving turkeys for 10,000 needy families.

Seattle University - During May 1980, Station KISW played the popular rock group REO Speedwagon in a charity basketball game, with proceeds going to the University Athletic Department. Through Station KISW's on-air promotion, over 2,000 tickets were sold at $3.00 each.

University District Jaycees - In June 1979 and 1980, Station KISW sponsored and promoted a foot race for the local Jaycees which raised money for their various good works.

Variety Club - During March 1980, Station KISW air personalities promoted and emceed a "chicken wing eating contest" held at halftime during a Seattle Supersonics basketball game. The entry fees for this event went to the local Variety Club for use in their various worthy projects.

37. During the license period, Station KISW broadcast its regularly scheduled news programming Monday through Friday. On Saturday and Sunday the disc jockey gave a constant update of the professional and collegiate sports events. (TR 416-417) During the composite week the station carried 278 minutes of programming logged as "news". On the average, 276 minutes of news was broadcast each week during the license period. (Kaye-Smith Exs. 10, p.63; 11, p. 1; TR 183, 548)

38. Station KISW's scheduled news programming comprised the following (Kaye-Smith Ex. 10, pp. 63-64; TR 415, 425, 538):

Newscasts[10] - At the outset of the license period ten daily newscasts were broadcast Monday-Friday, at approximately:

1:57 a.m.	7:42 a.m.
3:57 a.m.	8:12 a.m.
6:12 a.m.	8:42 a.m.
6:42 a.m.	9:12 a.m.
7:12 a.m.	11:57 a.m.

Beginning in July 1979 and continuing through the balance of the license period, five more daily newscasts, Monday-Friday, were added to the Station KISW schedule, broadcast at approximately:

3:42 p.m.	5:10 p.m.
4:10 p.m.	5:42 p.m.
4:40 p.m.	

Weathercasts - Weather forecasts for the greater Seattle area, each approximately twenty seconds long, were broadcast throughout the license period at approximately once each hour, seven days a week.

Lowdown - a recorded program of news of the music entertainment world, including interviews with celebrities, was produced and hosted by Station KISW's Music Director. Each program was three minutes in duration and aired four times daily, five days a week throughout the license period at:

2:57 a.m.	4:57 p.m.
6:57 a.m.	7:57 p.m.

39. Station KISW's regularly scheduled newscasts were locally produced by its news department, consisting of (Kaye-Smith Ex. 10, p. 64; TR 415-425, 548):

[10] Each newscast was two to three minutes in length, on average, uninterrupted by commercials.

(i) Two full-time, in-house newsmen who gathered, wrote and anchored the news;

(ii) A regular news stringer (a free-lance correspondent) reporting from the field; and

(iii) Student news interns from the Communications Department of the University of Washington in Seattle. For many years, Station KISW has offered University of Washington Communications students the opportunity to work part-time in its news department in return for college credit. (Similar student internships regularly have been conducted in other areas of station operation.) Three news interns per year (one at a time) participating during the license period.[11]

40. Each newscast was written by Station KISW's news staff. Sixty percent was devoted to local and regional news. All news stories, whether local or national, were, as a matter of programming policy, written to address the perspectives of the greater Seattle area and, especially, those of its younger residents, Station KISW's primary audience. These newscasts regularly utilized live and taped interviews with newsworthy community leaders and other citizens on events of national, regional and local concern. Station KISW's newscasts frequently incorporated on-the-scene reports of fast-breaking local news and sporting events, provided by Station KISW's regular news stringer. Newscasts utilized the Associated Press news wire and audio services. In addition, Station KISW subscribed to and utilized the youth-oriented "Earth News" and "Zodiac News" feature services whenever they would enhance local coverage. (Kaye-Smith Ex. 10, p. 65; TR 415-425, 548)

41. Throughout the license period, part of Station KISW's local news-gathering efforts was a series of local news beats, namely, news and information sources pursued on a regular basis by the newsmen and news interns. These beats were the sources of news and feature interviews presented on Station KISW's newscasts. Among the local news and information sources contacted by Station KISW personnel at least once a week, on the average, during the license period were (Kaye-Smith Ex. 10, pp. 65 and 66; TR 415-425, 548):

— King County Council (County government)

— King County Court

— King County Executive (County government)

— King County Fire Marshall

— King County Health Services (providing health information and clinics in such areas as Venereal Disease, Drug Abuse and Mental Health)

— Seattle City Council

— Seattle Fire Department

[11] Station KISW's full-time staffers taught each intern the basics of broadcast news gathering and production, including writing and interviewing skills. These students contributed to the station's news effort by assisting the full-time newsmen in the production of the newscasts.

— Seattle Mayor's Office
— Seattle Police Department
— Seattle Public Schools
— The offices of various state legislators in the State Capital of Olympia
— University of Washington in Seattle
— Washington State Department of Social Service and Health
— Washington State legislature (when in session)

Other beats included:

— King County Drug Abuse Service
— Seattle Consumer Affairs Office
— Seattle Department of Parks and Recreation
— Washington State Employment Security Department
— Washington State Transportation Department

42. Station KISW maintained these regular contacts during the license period as part of its effort to keep its listeners abreast of the news which would affect their lives as young adults. Through Station KISW's sports beats, the news staff also kept listeners informed during the license period of the progress of the Seattle area professional sports franchises and of the University of Washington sports teams. (Kaye-Smith Ex. 10, pp. 66-67; TR 412-425, 548)

43. Station KISW integrated non-logged news items into its daily programming. Seven days a week, between musical selections, Station KISW's air personalities frequently aired news items of potential interest to Station KISW's listeners, including upcoming sports, special events, traffic reports and news bulletins. This effort was aided by a daily listing of events going on in the area by Station KISW's news department, which was circulated each day among the air staff to apprise it of news events of significance to the area. (TR 438-444)[12]

(d) Commendations For Public Service Programs and Announcements

44. During the license period Station KISW received letters of commendation from various organizations in appreciation for donations and of Station KISW's promotion and support of various events. The organizations are the following (Kaye-Smith Ex. 14, pp. 1-4):

— Alderwood Manor Youth Club;
— Big Brothers of Seattle King County;
— Boy's Club of Seattle/King County;

[12] As noted, *supra*, on Saturday and Sunday when there were no regularly scheduled newscasts, the announcers gave updated sports results. (TR 441)

— Boy Scouts of America "Exploring" Program, Seattle, Washington;

— Bremerton Public Schools, Career Planning Office, Bremerton, Washington;

— Children's Orthopedic Hospital, Seattle, Washington

— Committee To Combat Huntington's Disease

— Friends of Youth, Renton, Washington

— Helpline, Renton, Washington

— Herzl-ner Tamid Synagogue, Mercer Island, Washington

— John F. Kennedy Memorial High School, Seattle, Washington

— Judicial Advocates

— March of Dimes Birth Defects Foundation Puget Sound Chapter, Seattle, Washington

— Planned Parenthood of Seattle, King County

— Puget Sound Musicians Referral Service

— Seattle-King County Convention and Visitors Industry

— Seattle Public Library

— Stevenson-Carson Public School

— University of Washington, School of Communications, Seattle, Washington, and

— Variety Club of The Pacific Northwest

(e) Testimony Of Community Leaders and Members of the Public[13]

45. Community leaders and members of the general public provided written testimony in support of Station KISW. Twenty affiants cited Station KISW's programming and community involvement, including its sponsorship and promotion of numerous community service organizations and events, and expressed the opinion that Station KISW has rendered a service to the Seattle area by informing as well as entertaining its residents. These individuals, listed alphabetically, are the following: Judy Balint, Office Coordinator, Focus (Kaye-Smith Ex. 16, p. 14); Jeanne Beall, Space Needle Corporation (Kaye-Smith Ex. 16, p. 12); Todd M. Bitts, President, Puget Sound Radio Broadcasters Association (Kaye-Smith Ex. 16, p. 26); Charles E. Blacksmith, Merchandiser, Roundup Music Distributors (Kaye-Smith Ex. 16, p. 24, 24A); Michael Campbell, Campbell Sports, Inc. (Kaye-Smith Ex. 16, p. 23); Major Bob L. Curran (Army Retired), Military Coordinator, Seafair (Kaye-Smith Ex. 16, p. 28); Nina L. Evers, District Director, Muscular Dystrophy Association (Kaye-Smith Ex. 16, p.5); Patricia P. Fearey, President, Pat Fearey & Associates (Kaye-Smith Ex. 16, p. 27); Tom Fortin, English and Media Instructor, Lynwood Senior High School (Kaye-Smith Ex. 16, pp. 17-18); Patricia Frank, Executive

[13] The "notorial imperfections" relative to the testimony of certain of these individuals is considered, *infra*.

Director, Puget Sound Big Sisters (Kaye-Smith Ex. 16, p. 9); Lynne A. Freeman, Director, Boys and Girls Club of King County and Vice-President, Gerber/Meyers Wolfe and Kilgore (Kaye-Smith Ex. 16, pp. 19, 22); Wanda Harrison, Program Coordinator, Leukemia Society, Washington State Chapter (Kaye-Smith Ex. 16, pp. 1-11); Lou Lavinthal, International Ambassador, Variety Club of the Pacific Northwest (Kaye-Smith Ex. 16, pp. 20-21); J. Daniel McConnell, President, The McConnell Company (Kaye-Smith Ex. 17, pp. 6, 6A); Julie McCullough, Trustee, Greenpeace, Seattle (Kaye-Smith Ex. 16, pp. 6, 6A); Charles Royer, Mayor of Seattle (Kaye-Smith Ex. 16, p. 4); Robert J. Steil, President, Squire Shop (Kaye-Smith Ex. 16, p. 25); John Taylor, Seattle Arts Festival (Kaye-Smith Ex. 16, pp. 13, 13A); Shawn Taylor, Boy Scouts of America, Seattle Counsel (Kaye-Smith Ex. 16, pp. 7-8, 7A-8A); and David Watkins, Vice President, Seattle Supersonics (Kaye-Smith Ex. 17, pp. 5, 5A).

46. It is appropriate to set forth in some detail the testimony of some of the leaders and the public witnesses as to the cooperation between Station KISW and the local organizations.

47. *Charles Royer*, Mayor of Seattle, personally worked with Station KISW on two public service campaigns. He expressed the view that the station showed "strong, effective commitment to broadcasting in the public interest" and that he was "very impressed with the station's civic consciousness and high professional standards." (Kaye-Smith Ex. 16, p. 4)

48. *Tom Fortin*, English and Mass Media Instructor at Lynnwood Senior High School and teacher in the Edmonds School District for 16 years, cited the station's PSAs on behalf of school activities, informative visits to the high school from station personnel and other Station KISW assistance with his Mass Media instruction. Fortin also cited the station's programming, noting that in addition to "excellent music programming," the station "provides programming and sponsors community events that inform us regularly." He characterized the informational programming as timely and provocative. (Kaye-Smith Ex. 16, pp. 17-18)

49. *Lynn A. Freeman*, member of the Seattle-King County Boys and Girls Clubs and Vice President of Gerber/Meyers Wolfe and Kilgore, attested to Station KISW's promotional and other support of the Boys and Girls Clubs and characterized the support given by Station KISW to the Boys and Girls Club of King County as one of the best of any radio station. Freeman noted that Station KISW provided its listeners with the information that is pertinent to their age and life-style. He also noted that the station was continually involved with the community, whether emceeing at a concert or at the Western Washington Fair Mud Wrestling Contest or having listeners respond to the station with ideas and suggestions. (Kaye-Smith Ex. 16, pp. 19, 22)

50. *Patricia P. Fearey*, a Seattle public relations professional who has worked with Station KISW for the past decade, acknowledged that Station KISW was community service oriented and had been extremely effective in developing and airing creative programs and announcements to aid multiple civic, charitable, and cultural organizations. She expressed the view that the willingness of the station to participate with the community in so many endeavors is unequalled by any station that she was aware of in the Seattle market. (Kaye-Smith Ex. 16, p. 27)

51. *Major Bob L. Curran* (Army, Retired) testified to Station KISW's continual on-air support of Armed Forces Day and other Military programs in Seattle. (Kaye-Smith Ex. 16, p. 28; TR 784)

52. *John Taylor*, Promotion Director of The Seattle Arts Festival, testified that, over the years, Station KISW had successfully promoted arts events in Seattle, contributing "$40,000 worth of air time at no cost to the festival, resulting in large, well-rounded audiences." (Kaye-Smith Ex. 16, pp. 13, 13A)

53. *Julie McCullough*, trustee of Greenpeace-Seattle, an environmental organization known for saving the planet's whales and the baby harp seals in Newfoundland, testified that her organization has been active in Seattle since 1975. Explaining that Greenpeace depends on local radio and television stations for public service announcement time and news coverage of its environmental activities, she commended Station KISW for consistently airing the organization's PSAs and for consistently talking about the work that Greenpeace was doing, not only through the news department but through the public service department. (TR 765-766)

54. *Shawn Taylor*, an executive with the Seattle branch of "Exploring", the Boy Scouts of America's career exploration program for young adults, expressed appreciation for the involvement of Station KISW and its personnel in several Exploring related projects over the last five years. (Kaye-Smith Ex. 16, p. 7-8)

(f) Efforts of Station KISW During the License Period To Comply With FCC Rules and Regulations

55. Between February 1, 1978 and January 31, 1981 (license period), in order to comply with the Commission's rules and regulations including, but not limited to, Equal Employment Opportunity (EEO) and Fairness Doctrine, Kaye-Smith relied on the following procedures (Kaye-Smith Ex. 12):

Melvin M. Bailey, an experienced broadcaster, served as Kaye-Smith's Director of Broadcast Operations with overall official responsibility for keeping abreast of changing regulations and coordinating compliance efforts of Kaye-Smith stations;

Bailey was in contact with Kaye-Smith's communications counsel on an average of 20-30-times a year to discuss compliance;

Bailey reported to Lester M. Smith, Executive Director of Kaye-Smith, on, at least, a weekly basis, keeping Smith up-to-date on the status of Kaye-Smith's compliance efforts;

Communications counsel and Smith were in touch, on a weekly basis, during which time they would discuss, *inter alia*, developments in FCC regulations in general and their applicability to Kaye-Smith stations.

56. During the license period, Station KISW made efforts to ensure equal employment opportunity to qualified individuals without respect to their race, color, religion, national origin or sex in all personnel actions, including recruitment, evaluation, selection, promotion, compensation, training and termination. Steve West, Station KISW's Station Manager, was responsible for the administration and implementation of the station's EEO program. In addition to the efforts noted in the Commission's Model EEO Program, Station KISW engaged in the following practices (Kaye-Smith Ex. 12):

— Periodic career seminars in cooperation with various area schools;

— Student internships;

— Development of a close working relationship with various personnel recruiting sources; and

— Frequent contact with minority and women's organizations

During the license period, two Black males were recruited as fulltime announcers and a Black female was hired as traffic director; nine non-Black women were hired for various positions (Kaye-Smith Ex. 7).

57. It was Station KISW's policy that, if during the presentation of views on controversial issues, an attack was made on the honesty or integrity of an identified person or group, that person or group would be given notice, a transcript of the attack, and an opportunity to respond. In addition, Station KISW afforded equal opportunities to opponents of qualified candidates for elective office who purchased time on the station. (Kaye-Smith Ex. 12)

58. Station KISW's "Statement Respecting Applicant's EEO Procedures," dated September 1980, makes clear that it is the licensee's policy to provide equal employment opportunity to all qualified applicants for positions at the station. West, the General Manager, had the responsibility for the implementation of the EEO policy. Employment application forms contained a notice that there would be no discrimination and appropriate notices were posted informing applicants and employees that the station was an EEO employer. (Kaye-Smith Ex. 20)

59. Station KISW's Emergency Broadcast System (EBS) transmission tests were logged on the station's operating logs[14] on the following dates

[14] Siegnethaler, the Chief Engineer, maintained that the transmissions were consistently logged in the program log. However, he acknowledged that there was a requirement to log the EBS transmissions in the operating logs. (TR 719)

during the period May 1, 1980 and October 31, 1980: 5/1, 5/2[15], 5/9, 5/26, 6/4, 6/9, 6/18, 6/23, 7/2, 7/7, 7/16, 7/30, 8/27 and 10/1. Additionally, relative to the same 6 months time period, the station's operating logs indicated: that the emergency action notification system tests receptions were logged as received on 5/7, 7/16 and 8/12; that EBS transmission tests by Station KIRO(AM), the primary EBS station, were logged as received on 5/8, 5/16, 6/4, 6/12, 7/1, 7/25 and 8/29; and, lastly, that EBS receiver checks were logged on 5/8, 5/16, 6/12, 6/14, 7/1 and 8/29. (TR 744-745)

60. The Commission granted Kaye-Smith authority to construct a translator (K-283AA) with an antenna utilizing a three-element colinear array. However, the translator was built using a TACO-Y-51 antenna. Importantly, the substituted antenna was identified and its performance characteristics were tabulated and submitted as part of the license application for the translator. The license application was granted by the Commission. (Kaye-Smith Ex.19, pp. 1-6; TR 724-730)

61. Station KISW, in 1980, found it necessary, because of serious interference, to replace its licensed Moseley 7 watt microwave transmitter (Model PCL 303C) with a TFT (Model 7700) 12 watt unit.[16] As the time it was installed, Siegenthaler, the Chief Engineer, did not realize that an FCC Form 313 should have been filed requesting prior Commission approval for its use. (TR 713-717)[17]

(g) Kaye-Smith's Other Media Interests

62. In addition to Station KISW(FM), Seattle, Washington, Kaye-Smith is the licensee of four radio stations: KXL-AM-FM, Portland, Oregon and KJRB and KEZE-FM, Spokane, Washington. Portland and Spokane, respectively, are 142 and 237 miles from Seattle. (Kaye-Smith Ex. 18, p. 2; TR 803)

63. There are 10 AM, 9 FM, and 4 television commercial stations licensed to Portland.[18] Additionally, Portland is served by two cable systems which deliver additional television signals to the Portland area. Two daily and four weekly newspapers serve Portland. (Kaye-Smith Ex. 18, pp. 1-3, 8, 10, 17, 19; TR 797, 803)

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[15] It appears that this is not the correct date. (TR 744)

[16] The TFT microwave transmitter had superior adjacent frequency interference characteristics. (TR 713)

[17] Equipment performance measurements were made by Siegenthaler, the Chief Engineer on September 29, 1980. He could not recall if he had signed the engineering portion of the renewal application before or after these measurements were taken. (TR 706-709)

[18] There are 4 Portland non-Commercial broadcast facilities and 1 television station.

64. Spokane is the community of license of twenty-four radio and television stations[19]; two television construction permits have been granted for Spokane. In addition, the Spokane area is served by a thirty-five channel cable system delivering additional television signals, and by two daily newspapers. (Kaye-Smith Ex. 18, pp. 4-5; TR 803)

(3) Vincent L. Hoffart d/b/a Hoffart Broadcasting

65. Hoffart Broadcasting, the permit applicant, is a sole proprietorship owned by Vincent L. HOffart (Hoffart). He was born on September 5, 1916 in Bismarck, North Dakota. After graduating from high school, Hoffart worked at various theaters as a projectionist and thereafter as an installer and servicer of theatre projectors and sound equipment. (Hoffart Ex. 4, pp. 1-9: TR 838)

66. At the start of World War II, Hoffart attended night classes in electronics at the North Dakota Agricultural College, Fargo, North Dakota. After six months of school, Hoffart entered the Signal Corps where he attended Radar school. During this period, Hoffart obtained his Radiotelephone First Class and Radiotelegraph Second Class FCC licenses. In 1943, Hoffart was assigned to the Air Base in Spokane, Washington, where he supervised the installation of air-ground communications equipment in Medford, Oregon and Portland, Oregon. Hoffart also participated in IFF radar installations and radio direction-finding installations. Subsequently he received training on airborne communications equipment and airborne radar. (Id.)

67. After the war, in 1947, Hoffart settled in Spokane. In August of 1947, he joined then Station KNEW (later Station KJRB), Spokane, Washington, then under construction, as a radio engineer. Hoffart assisted with the directional proofing of the station and with installation of equipment. He was named chief engineer of the station in 1950 and remained in that position until 1974. In 1967, he was given additional duties at other stations owned by the licensee, including the post of engineering director for all the stations.[20]

68. While chief engineer for Station KNEW, Hoffart installed a new AM transmitter for Station KJR, Seattle, Washington and assisted in the installation of two-way radio communications for fall-out shelters in Civil Defense headquarters in Spokane. (Hoffart Ex. 4)

69. While employed by Kaye-Smith and its predecessor, Hoffart was also engaged in moving the AM-FM studios of Station WCOP, Cincinnati, Ohio, and took on the added responsibility of engineer for these stations which were renamed Stations WUBE-AM and WCXL-FM. He designed

[19] Five are non-Commercial broadcast facilities and one is a non-Commercial television station.

[20] During part of this time, Hoffart commuted to Seattle from his home in Spokane.

studios for Stations KCKN-AM and FM, Kansas City, Kansas, and helped make the move to their new studios. Hoffart was also involved with the installations of AM and FM transmitters for these stations. (Hoffart Ex. 4)

70. Since 1976, Hoffart has done engineering for Station KXLY-TV, AM and FM, Spokane. He did special projects for Station KVEW-TV, Pasco-Kennewick, Washington and he worked on remodeling and installation of a video production studio at Station KTHI-TV, Fargo, North Dakota. He donated his services toward the installation and operation of Station KPBX-FM, Spokane Public Radio. He is currently on standby as engineer for Station KVNI-AM, Coeur d'Alene, Idaho. (Hoffart Ex. 4)

71. Hoffart is a charter member of the Society of Broadcast Engineers. He holds certification from the Society as a Senior Broadcast Engineer. Certification is based upon accumulation of points given for articles written, holding office, attendance to meetings and lectures. Hoffart helped organize the Spokane Chapter of the Society of Broadcast Engineers and has held office as Chairperson, Vice Chairperson, and Secretary-Treasurer. He resigned as Secretary-Treasurer to devote his time to his application for Channel 260, Seattle. He continues to attend regular meetings of the Society of Broadcast Engineers. (Hoffart Ex. 18)

72. Hoffart subscribes to the FCC Rules and Regulations Part III and he has a copy of Part 1 of the Rules, complete with all addendums from 1976 to 1980. Hoffart also has the 1948 edition of the Communications Act of 1934 and the latest edition of the Communications Act, with addendum. Hoffart has subscribed to the second series FCC reports since 1977 and he is a current subscriber to the Federal Register. He subscribes to Broadcasting Magazine, Broadcast Engineering and Signal, the publication of the Society of Broadcast Engineers. He also subscribes to or receives such technical publications as "Radio-Electronics", RCA and electronics manufacturers' publications, and equipment brochures and catalogues. Hoffart has subscribed to the Seattle Post-Intelligencer, Seattle's daily morning paper, since 1977. He maintains a file of clippings from the newspaper to keep current on community happenings and needs. Hoffart reads all publications for information to keep himself current on FCC requirements and advances in the technical and programming aspects of broadcasting. (Hoffart Ex. 11)

73. Hoffart was active in the development and implementation of emergency broadcast services and facilities involving the Conelrad system during the 1950s. Hoffart, as chief engineer at Station KNEW, converted a 500 watt transmitter donated by the Spokane Police Department to 640 kHz. This transmitter became the backbone of the Spokane Area Conelrad system. Hoffart also helped to obtain the loan of an emergency engine to be used in conjunction with this transmitter. (Hoffart Ex. 16)

74. When the Emergency Broadcast System (EBS) was developed to replace Conelrad, Hoffart persuaded the licensee of Station KNEW to participate with the Commission and the Army Corps of Engineers to provide an underground studio. A hardened site fall-out shelter was built at Station KNEW. This studio was equipped with fall-out monitoring equipment and emergency supplies to sustain 12 persons for two weeks. A two-way radio system connected with the City of Spokane's Emergency Headquarters was installed. Also installed was a new emergency diesel power plant capable of operating the station at full power. Monthly testing of this equipment was initiated with Hoffart participating. Hoffart participated in Civil Defense training and attended Commission seminars on EBS. He developed a Local Disaster Communications Plan. This plan, accepted by the Commission, was the first instituted in the Pacific Northwest. Hoffart continues to be concerned with the need for a communications system to operate in the event of an area emergency. The aftermath of the eruption of Mt. St. Helens, in Hoffart's opinion, illustrates the need for a plan for such services. He proposes to continue his efforts in this regard if he obtains a construction permit. (Hoffart Ex. 16)

75. Hoffart has resided in Spokane, a city approximately 240 miles from Seattle, continuously since 1947. He owns a house in Spokane where he resides with his wife and one of two sons. (Kaye-Smith Ex. 18, p. 1; Hoffart Exs. 4, pp. 1, 2, 6; 7, p. 17; TR 803, 838, 877, 909)

76. Hoffart does not own any property in the Seattle area and has no business interests there. He does not now have, nor has ever had, any civic or communal association with Seattle area organizations. (TR 910-911)

77. Hoffart has not been employed on a full-time basis since 1976. As detailed, *supra*, his exclusive work experience is as a radio engineer and in related supervisory capacities. He has no experience in broadcasting management, news and public affairs programming, entertainment programming or sales. Hoffart has no mass media ownership interests. (Hoffart Ex.4, pp. 1-9; Hoffart Ex. 6, p. 1; TR 838, 840, 918)

78. Hoffart proposes to commute from Spokane[21] on a weekly basis for the initial year of operation, leaving Spokane on Monday morning by air or automobile and returning on Friday afternoon. Initially, he will personally "direct all operations, including programming, etc." He will retain responsible persons as sales manager and program director and

[21] Hoffart does not presently have any residence in Seattle and has never voted in Seattle. (TR 909-910) He first visited Seattle in 1959 to install a transmitter as Station KJR and made many visits subsequently. During the 1972-1974 period he spent over 50% of his time in Seattle working for Kaye-Smith. He had an apartment in Seattle and returned to Spokane on weekends.

will appoint a public service director from the staff. Hoffart represented that while he will "subsequently" appoint a station manager, he will not relinquish "responsibility for day-to-day operations." (Hoffart Ex. 3, pp. 7 and 23; TR 924-925)

B. Hoffart's Financial Qualifications Issue

79. The Commission, in designating the applications for hearing[22], noted that Hoffart estimated that $250,500 would be required to construct and operate the proposal for three months. Those costs were itemized as follows:

Equipment (4 months payments)	$ 12,227
Site Lease (3 months)	3,000
Building (lease, included in operating costs)	
Legal fees	5,000
Engineering Fees	1,000
Installation Costs	5,000
Miscellaneous	7,895
Operating Costs (3 months)	187,225
Contingencies	29,153
Total	250,500

The Commission (para. 7) also noted that Hoffart, in estimating his lease payments at $1,000 a month, had stated that he would lease the transmitter and antenna site presently leased to Kaye-Smith. However, since Hoffart admitted that he had never contacted Ratelco, Inc. the site owner, concerning a lease and had not indicated Kaye-Smith's cost for its lease, the Commission ruled that the lease for Hoffart's $1,000 per month estimate would have to be explored at hearing.[23] Additionally, the Commission (para. 8), noting that Hoffart had failed to submit written documentation verifying the $12,227 estimated equipment lease cost, ruled that further inquiry relative to this cost item was warranted. Although none of the other cost estimates itemized by Hoffart were questioned by the Commission, it was ruled (para. 13) that the total cost necessary to construct and operate the proposed station and the availability of funds[24] to meet anticipated expenses were unclear and it specified a general financial issue with respect to Hoffart.

80. After designation of this matter for hearing, Hoffart obtained a written equipment lease proposal from Harris Corporation. The lease terms require a down payment of $15,200 and approximately $3,000 per

[22] 90 FCC 2d 105

[23] The Commission (footnote 10) ruled that Hoffart would be required to submit his contingency planning in case the Kaye-Smith site was not available

[24] The Commission set forth its concerns as to the availability of funds in paragraph 9 - 12 of the designation order.

month for 79 months. (Hoffart Ex. 7, p. 10)[25] This would require increasing estimated costs by approximately $12,000[26], resulting in total costs approximating $262,500. (Hoffart Ex. 7)

81. Kaye-Smith's lease with Ratelco, Inc. (Ratelco), dated January 21, 1981, provided for a payment of $500 per month. The Ratelco lease is non-assignable. Hoffart has not inquired of Ratelco whether it will consent to assignment of the lease to him, and/or whether Ratelco will enter into a new lease with him, and the terms thereof. (Hoffart Ex. 7, pp. 1-3, 7-10; TR 852, 863-864)[27]

82. Hoffart has specified an alternate site in the event that the present main Kaye-Smith site owners prefer not to lease to Hoffart. This is the site of the current Kaye-Smith alternate transmitter site at 92nd and Roosevelt. This site is owned by Kaye-Smith. (Hoffart Ex. 15; TR 971-972)

83. Hoffart relies on two sources for financing. First, Hoffart relies on his own assets. Secondly, he relies on a $200,000.00 loan from Howard Graves, a friend. (Hoffart Ex. 7, p. 3; TR 877)

84. Hoffart's net worth statement as of October 13, 1982 show assets and liabilities as follows (Hoffart Ex. 7, pp. 11-12):

Lincoln Mutual Savings and Loan (checking account)	$ 2,290.94
Lord Abbott Cash Reserve Fund	1,670.00
Merrill Lynch Ready Asset Fund	1,913.47
Composite Case Management/Murphey Favre	2,544.36
Lincoln Mutual Savings-time deposits	3,745.93
Lincoln Mutual Savings-time deposits	6,757.52
Sub total:	$ 18,921.82
Loan and Interest	
Jerry Sherman (due on demand or by 12/15/82)	31,000.00
Common Stocks	
Boise Cascade - 100 shares	3,137.50
RCA - 200 shares	4,975.00
Willamette Industries - 46 shares	1,069.50
Sunshine Mining - 2810 shares	30,207.50

[25] The Presiding Judge rejects Kaye-Smith's contention that this letter does not express "a willingness" to provide these lease terms to Hoffart.

[26] The $15,200 down payment plus $9,000 for 3 months of payments results in equipment costs of $24,200, as contrasted with the earlier estimate of $12,227.

[27] Hoffart's estimated operating costs are predicated on cost estimates submitted by O'Day Broadcasting in an application. (TR 926-927)

RCA-Div., re-investing account	
47.4019 shares	1,179.12
Chester Mining – 250 shares	337.50
Sub total	$ 40,906.12
Mutual Funds	
American General Enterprise – 78 shares	936.00
Founders Mutual Growth Fund – 447.5 shares	3,723.20
Sub total	$ 4,659.20
Real Estate	
Residence and lot (Idaho)	$ 68,400.00[28]
Lot (Idaho)	14,000.00[29]
Residence and lot (Spokane)	35,100.00
Lot (Spokane)	4,000.00
Sub total	$ 121,500.00
Autos and Miscellaneous	
1969 Cadillac	500.00
1972 Jeep Wagoneer – 4 wheel drive	2,000.00
Power tools	500.00
Sub total	$ 3,000.00
Total Assets	$ 219,987.14
Liabilities	
upcoming and anticipated	1,500.00

85. Assets of Vincent Hoffart are community property jointly held with his wife, Alvina C. Hoffart. She has agreed to the use of community assets by her husband to further his application and to construct and operate his proposal if a construction permit is granted. (Hoffart Ex. 7, p. 13)

86. Hoffart proposes to mortgage his real estate and to liquidate his securities and mutual funds, and to use the proceeds, together with the funds in his checking, savings and money-market accounts, to meet projected costs. Liquidation of Hoffart's securities will require a payment of $867.31 in brokerage commissions, plus the payment of a tax on any capital gains. The record is silent as to the amount, if any, of such tax. (TR 932-941, 944-945)

87. The "loan receivable" has not been reduced to writing and is unsecured. Repayment of the loan is contingent upon the profitability of

[28] This is the assessed valuation for Hoffart's home in Bonner County. He doesn't plan on selling it, but would seek a mortgage on the property. He has not confirmed with his bank the amount of such mortgage. (TR 835-836)

[29] This is the assessed value. Hoffart does not have a buyer for this land. He would also seek to mortgage this property. (TR 937-938)

the debtor's business venture. There is no record evidence as to the debtor's ability to repay the loan. (Hoffart Ex. 7, pp. 16-17; TR 877, 942-950)

88. Hoffart also owns fixed assets consisting of real property in Idaho and Washington. On the basis of tax assessments, Hoffart values the properties at $121,500. Hoffart offered no evidence as to whether the assessed values reflect fair market value. Hoffart has not received any offers from persons ready, willing and able to buy the properties. (Hoffart Ex. 7, pp. 17, 33, 35; TR 877, 935-941)

89. Graves, a friend of Hoffart, has agreed to lend Hoffart $200,000.00, without collateral, for an initial term of one year at one percent over prime. During the initial term of the loan, Graves will require Hoffart to make quarterly interest payments only. Thereafter, the loan is renewable at Hoffart's option, with the repayment schedule to be determined at the time the loan is taken down. (Hoffart Ex. 7, p. 20; TR 877, 888-894, 903-908)

90. Graves relies on his assets to fund the loan. Graves' financial statement, dated August 12, 1982, shows the following (Hoffart Ex. 7, pp. 22-25):

Liquid Assets	
Old National Bank, certificates of deposit	$ 45,385.00
Seattle First National Bank (certificates of deposit)	41,122.43
Real Estate	
Condominium, valued at	100,000.00
Business Buildings (2916 and 2926 S. Regal)	200,000.00
Total Assets	$ 386,507.43

91. Howard Graves has no liabilities. (TR 902) He also has assets over and above those listed. These assets amount to approximately $180,000. (TR 901-902) Graves' willingness to back Hoffart is not contingent upon anything. Graves' real estate is unencumbered, and if necessary, Graves would take out loans secured by the real estate he owns. His valuation of the condominium is set well below the most recent sale of comparable property. His valuation of his business buildings is based upon a recent sale offer which was not effectuated because of the willingness to buy the property subject to a 1 year lease. (TR 900) Properties not as desirable have been sold at higher prices. (Hoffart Ex. 7)

92. To the extent that early redemption of the certificates of deposit results in interest forfeitures, Graves will require Hoffart to absorb such penalty. The Seattle-First National Bank certificates ($41,122.43) bear interest of at least 9.855 percent per annum: the Old National Bank certificates ($45,385.00) accrue interest at a minimum rate of 13.015

percent per annum.[30] (Hoffart Ex. 7, pp. 22-25, 39-40; TR 877, 896-898, 901-902, 905)

(C) The Notarial Imperfections Issue re Kaye-Smith

93. As noted, *supra*, the *Order Prior to Prehearing Conference* advised the parties that each direct case exhibit had to be accompanied by an affidavit of the sponsoring witness. Additionally, at the August 6, 1982 conference the Presiding Judge stressed that the written testimony of community leaders and public witnesses was to show on its face that it was sworn testimony being submitted in a docketed Commission proceeding. These witnesses were to have been informed that they were subject to being called for cross-examination. (TR 106-107)

94. Kaye-Smith, as part of its written direct case, sought testimonials from Seattle area residents as to Station KISW's performance during the license period (February 1, 1978 - January 31, 1981). Kaye-Smith counsel telephoned Lester M. Smith, Executive Director of Kaye-Smith, concerning such testimonials. Smith recalled that counsel had asked that the station obtain letters of endorsement and that counsel made no reference to affidavits, (TR 770) Smith delegated the task of obtaining such letters to Stephen L. West, General Manager of Station KISW. Smith directed West to work directly with counsel in obtaining the letters. West enlisted the aid of Station KISW Program Director Eric S. Bogel, as well as other Station KISW employees. (TR 204-209, 302, 485-487, 502-503, 505-506, 589, 769-770)

95. West spoke with counsel over the telephone about the matter. Following such conversation, West understood that the testimonials required verification by a notary and that each potential affiant was to be informed that his or her sworn letter was intended for use as testimony in a hearing before the Commission. West, in turn, personally told each Station KISW employee he recruited for the task of obtaining letters that each letter required notarization. West also instructed the employees to inform each potential affiant of the intended use of the letters. (TR 208-209, 302-304, 485-488, 502-503, 505-506, 589)

96. West was not a notary. At the time, he instructed Station KISW employees about obtaining the testimonial letters, he believed that notarization merely authenticated the identity of the signatory of a statement. West did not understand that proper notarization required that the attestation take place in the physical presence of the notary. (TR 308-310)

97. Bogel was also not a notary. He requested the individuals to have their letters notarized at the time Bogel undertook to assist West in obtaining testimonial letters. He understood that an "affidavit" simply

[30] However, it must be noted that the maturing dates have all expired.

was a legal term for a "testimonial letter on someone's letterhead, signed by them." Bogel had no understanding as to the legal significance of notarization. (TR 504-506)

98. In addition to assigning other station employees the chore of obtaining letters, West and Bogel personally participated in soliciting letters. Testimonials were solicited by West, Bogel and Station KISW staffers in person or over the phone. (TR 207, 302-304, 325, 485-488) While West informed the individuals "in a couple of cases" that they might be called as a witness, he acknowledged that he didn't tell any of the others that they would be subject to cross-examination because he didn't understand that to be the situation. For example, West didn't tell Charles E. Blacksmith at the time he solicited a testimonial letter from him that he was subject to being called for cross-examination. (TR 311-313)

99. Area residents responded by furnishing letters. Some arrived at Station KISW by mail and others were hand-delivered. Upon receipt, each letter was channeled to Margaret Noren, administrative assistant to West, and a notary in the State of Washington. Noren retained the statements, pending mailing to counsel in New York City.[31] (TR 550-561, 592-593, 663)

100. Prior to such mailing, West and Noren reviewed the letters and realized that letters from Judy Balint, Charles E. Blacksmith, J. Daniel McConnell, Julie McCullough and Shawn Taylor lacked notarizations. West instructed Noren to have the five letters notarized and she, in turn, told Carrie Matthew, a station employee, and a notary in the State of Washington, to notarize them. (TR 594-595)[32] Matthew affixed her signature and her seal to each letter. Matthew affixed the date of her notarial act on the testimonials received from McCullough and Taylor, but overlooked doing the same with respect to the testimonial letters from Balint, Blacksmith and McConnell. (Kaye-Smith Ex. 16, pp. 6, 7-8, 14, 24; Kaye-Smith Ex. 17, p. 6; TR 550-561, 594-599, 616, 619)

101. The testimonials in Station KISW's possession were mailed to counsel, who exchanged them by mail, on Thursday, November 11, 1982, as part of Kaye-Smith's written case. Kaye-Smith Ex. 16, exchanged on November 11, 1982, and entitled "Testimony Concerning KISW Community Service." This exhibit contained the affidavits of 19 community leaders and/or public witnesses and affidavits of Bogel (p. 2) and West (p. 15) attesting to the fact that the affidavits had been obtained by them or

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[31] She understood that the letters were to be notarized because "they would be in a court situation and the notary makes it a legal document." (TR 530-531)

[32] Noren was concerned and had questions in her own mind as to whether this was proper in that she believed these persons should appear before the notary and affix their signature or, at least, approve such notarization. She couldn't recall if she expressed this concern to West. However, she went ahead and asked Matthew to notarize these letters because West had told her to have it done. (TR 595-599)

under their direction and that they had explained to each affiant that his or her affidavit would be used as testimony in the proceeding before this Commission. The improperly notarized affidavits of Balint (p. 14), Blacksmith (p. 24), McCullough (p. 6) and Sharon Taylor (p. 7-8) were submitted as part of Kaye-Smith Ex. 16. The improperly notarized affidavit of McConnell was submitted as part of Kaye-Smith Ex. 17, entitled "Testimony Concerning Service To Advertisers."[33] On Monday, November 15th, counsel spoke to West. That conversation revealed to counsel that Matthew had affixed her notarial seal and supplied her signature to the Balint, Blacksmith, McConnell, McCullough and Taylor letters, without having those persons before her at the time.[34] Counsel told West that each letter writer had to appear and sign his or her letter and swear to its correctness in the presence of a notary. Counsel also told West that the affidavits from John Taylor (Kaye-Smith Ex. 16, p. 13) and David Watkins (Kaye-Smith Ex. 17, p. 5) which lacked the dates of notarization, required re-execution in order to provide such dates. (TR 309-310, 322, 493, 511, 600-604, 607-608, 791-792)

102. West made efforts to obtain properly notarized affidavits from Balint, Blacksmith, McConnell, McCullough and Shawn Taylor. Properly notarized affidavits were obtained from all but Balint who was unavailable. West also made efforts, through Station KISW's staff, to obtain properly notarized affidavits from John Taylor and Watkins.[35] A properly executed affidavit was received from John Taylor. A letter was received from Watkins bearing his purported signature, but without a notarial seal and signature.[36] Noren talked to Watkins on the phone about the absence of the seal and notarial signature on the letter bearing his purported signature. Watkins told Noren to affix her seal and signature and she did so. At the time, Noren was under the impression that the letter had been signed by Watkins. However, Watkins secretary, at his direction, had affixed his signature. Watkins had overlooked mentioning this fact to Noren. Noren also put her seal and signature to a letter from another area resident, C. Clark Griffin, in order to cure an erroneous dating of Griffin's affidavit. Griffin's affidavit had been notarized by a notary unconnected

[33] Kaye-Smith Ex. 7 also contained an affidavit of West (p. 2) attesting to the fact that the affidavits had been obtained by him or under his direction and that it had been explained to each affiant that his or her affidavit would be used as testimony in the proceeding before the Commission.

[34] The record does not support Hoffart's contention that corective action was only taken when Station KISW personnel learned that Hoffart was making inquiries of the affiants as to the notarization of their affidavits.

[35] As noted, *supra*, those two affidavits were not dated by the notary.

[36] Watkins had not been informed that his affidavit was to be used as testimony in a Commission hearing. West told him it was for "their files for FCC purposes." (TR 683-684)

with the station. (TR 344, 491-492, 511, 600-601, 605-608, 612-613, 622-623, 686-691)

103. Seven re-executed affidavits, from Blacksmith, Griffin, McConnell, McCullough, John Taylor, Shawn Taylor, and Watkins, were forwarded to counsel. Prior to the hearing herein, counsel, by letters dated November 23 and 24, 1983, exchanged these seven re-executed affidavits in substitution of the previously exchanged, improperly notarized affidavits. (TR 138-141)

104. As noted, *supra,* the Presiding Judge specified an issue dealing with notarial imperfections. The parties were given an opportunity to adduce evidence relating to the entire process of soliciting and notarizing the affidavits. (TR 201-792)

105. Smith was unaware of the procedures Noren and Matthew followed in notarizing testimonial letters received by the station. On or about November 15, 1982 Smith learned that there was "some problem" with the affidavits that had been obtained. He instructed West to "work it out with counsel". He first learned of the details of the problem on the first day of the hearing, November 30, 1982. (TR 768-770, 786-787)

106. Noren has been with Station KISW for about four and one-half years. In June 1979, she became a notary in order to facilitate station billing. Her experience as a notary had been limited to certifying to the airing of commercials by Station KISW by signing a paper and affixing her notarial seal. Prior to this proceeding, she had never notarized anyone else's signature. Noren was without training as a notary. No educational experience or training was required of her, nor was she required to pass any examination to become a notary. (TR 583-588)

107. Matthew is 21 years of age. She became a notary in June 1982 solely as a potential stand in for Noren. Prior to this proceeding, she had never performed a notarial act. As was the case with Noren, no educational experience or training was required of her, nor was she required to pass an examination to become a notary. (TR 529-533, 553-554, 561-564)

108. Both Noren and Matthew were unaware of the legal significance of the notarization process. Neither understood that notarization required that a paper be signed and sworn to in the presence of the notary. Noren believed that a document could be notarized with the approval of the author, outside of his or her presence.[37] Matthew believed her "notarial" acts to be proper. (TR 532-536, 553-565, 585-592, 598-599, 608, 612, 616-619)

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[37] As noted, *supra,* she had questions in her mind as to the propriety of anyone notarizing a signature which had not been affixed in the presence of the notary. However, she mistakingly believed that a notarization could be affixed to a signature where the affiant had not signed in the notary's presence so long as the affiant approved of such procedure. (TR 595-599)

109. Balint, McConnell, McCullough, Blacksmith and Shawn Taylor testified that he or she voluntarily authored his or her testimonial letter. Except for McCullough, each recalled being asked by a representative of Station KISW to have his or her statement notarized. Each was either unable to find a notary or neglected to do so. Except for Balint and Taylor, each understood that his or her letter was to be used in a Commission proceeding, although only Blacksmith and McConnell recalled being told that the letters were to be used in a hearing. (TR 629-644, 645-660, 661-681, 749-767, 771-779)

Ultimate Findings and Conclusions

1. Dena Pictures, Incorporated and Alexander Broadcasting Company a Joint Venture d/b/a Kaye-Smith Enterprises (Kaye-Smith) seeks a grant of its application for renewal of the license of FM Station KISW, Seattle, Washington. Vincent L. Hoffart d/b/a Hoffart Broadcasting (Hoffart) has filed a mutually exclusive construction permit application for the Station KISW facility. As a result, a choice must be made between these two applicants. However, Hoffart must first establish whether he is financially qualified to construct and operate his proposed broadcast facility. Additionally, Kaye-Smith must establish its qualifications to continue as a broadcast licensee in view of the incident involving "notarial imperfections" relative to the submission of its direct written case. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Adleman*, 28 FCC 432 (1960); affirmed *sub nom. Guinan vs. Federal Communications Commission*, 111 U.S. App. D.C., 371, 297 F. 2d 782 (1961) Therefore, it is necessary to first resolve the issue as to Hoffart's financial qualifications and the "notarial imperfection" issue relative to Kaye-Smith before undertaking a comparative evaluation of the applicants.

2. The Commission, in its *Designation Order*[38], noted that Hoffart estimated that $250,500 would be required to construct and operate his proposed station for 3 months. The Commission set forth a breakdown of the various cost items which made up the $250,500 total cost figure. The Commission further noted that Hoffart, in estimating his antenna site lease payment at $1,000 a month, had stated that he would lease the antenna site presently leased to Kaye-Smith as the licensee of Station KISW. Since Hoffart had admitted that he had never talked to the lessor of this site concerning such a lease and had not indicated the lease cost incurred by Kaye-Smith, the Commission ruled that Hoffart's $1,000 per month antenna site lease cost would have to be explored at the hearing. The Commission also noted that Hoffart had failed to submit written documentation verifying the $12,227 estimated equipment lease cost and

[38] *Kaye-Smith Enterprises*, 90 FCC 2d 105 (1982).

ruled that further inquiry with respect to this item was warranted. The Commission did not question any of Hoffart's other cost estimates; however, it ruled that the total costs necessary for the construction and operation of the proposed station and the availability of the necessary funds was unclear. The Commission specified a general financial issue.

3. Kaye-Smith's contention that Hoffart failed to make a "full showing" with regard to his costs; has not demonstrated the availability of sufficient liquid assets to meet his costs, and has not established that Howard Graves, the individual who is to loan Hoffart $200,000, has the financial ability to meet such a loan are rejected. The record establishes that Hoffart's total construction costs would approximate $262,500. It is specifically ruled that Hoffart has shown that the equipment lease is available to him and he has shown that there is sufficient financial resources available to him to meet the estimated cost of construction. The Presiding Judge agrees with the Mass Media Bureau that Hoffart has established the cost for leasing the proposed antenna site. The record establishes that Hoffart has budgeted 3.3 times the amount specified in the 1980 lease agreement that Kaye-Smith had with the lessor and exceeds the amount specified in the 1981 lease. It is ruled that Hoffart has budgeted a sufficient amount to lease his proposed antenna site.

4. Kaye-Smith's contention that Hoffart has not shown sufficient net liquid assets, over and above the $200,000 loan from Howard Graves, to meet his construction cost is rejected. Hoffart has a net worth of $218,487. He has established that $64,487 represents liquid assets. It is noted that after subtracting the $64,487 in liquid assets from the total net worth Hoffart would continue to have approximately $155,000 in additional fixed assets which he is prepared to use to finance the construction of the station.[39] Since Hoffart's fixed assets greatly exceed his $1,500 liabilities it is not unreasonable to conclude that at least 50% of the $155,000 would be available to help finance the station. Thus, it is concluded that Hoffart, himself, can make available an amount approximating $140,000. More importantly, it is ruled that Hoffart has available $200,000 in the form of a loan from Howard Graves. The record clearly establishes that Graves has sufficient assets to fulfill his commitment to Hoffart. Graves has $86,500 in savings certificates, a condominium valued at $100,000 and business buildings valued at $200,000. Graves has shown that he can meet his loan commitment to Hoffart. Accordingly, it is ruled that Hoffart is financially qualified to construct and operate the proposed FM broadcast facility.

[39] This includes Hoffart's loan receivable (Jerry Sherman) of $31,000. This asset far exceeds the $1500 in current assets and the $3857 in anticipated additional costs. While it is recognized that this $31,000 loan receivable has not been aged and certified collectable, it may still be given limited consideration with respect to offsetting incurred liabilities. *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982)

5. It is now necessary to consider the "notarial imperfection" issue specified against Kaye-Smith. As detailed in the findings, the Presiding Judge made clear that the direct written testimony of witnesses was to be appropriately notarized and that the witnesses were to be informed that they were subject to being called for cross-examination. However, the findings establish that the written testimony of 5 witnesses had not been notarized. Steven L. West (West), general manager of FM Station KISW, instructed Margaret Noren, West's administrative assistant, to have the written testimony of these 5 individuals notarized and forwarded to communications counsel.[40] Noren instructed Carrie Matthew, a station employee, to do the notarizing, which she did by affixing her signature and seal to the 5 signatures. Matthew had not previously notarized anyone's signature and was unfamiliar with the appropriate notary practices. She mistakenly believed that she was not acting improperly when she notarized the documents outside the presence of the affiants. West similarly believed that what was being done was not improper. The record establishes that the "notarial imperfections" were the result of error by the station employees intrusted with the assignment of obtaining the written testimony of the community leaders. There does not appear to have been any intentional disregard of the Presiding Judge's instruction or of the requirements of proper notarization. It is concluded that this failure represents an innocent error and that there was no intention to mislead the Commission.[41] The Presiding Judge agrees with the Bureau that the improprieties in notarization were the result of ignorance, rather than design. While this unfortunate incident should never have happened, it is ruled that there was no intention on the part of the licensee to mislead this Commission or abuse its processes. At most it warrants no more than assessing a slight comparative demerit. *WIOO, Inc.*, ____ FCC 2d ____, FCC 83-367, released September 16, 1983[42]

6. Having determined that both applicants possess the requisite qualifications to be a broadcast licensee, it is appropriate to determine

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[40] The written testimony was in the form of communications on the letterhead of the local organizations attesting to the cooperation and programming of Station KISW.

[41] These individuals were subject to cross-examination. No purpose would have been served by submitting improperly notarized testimony or not informing them that the letters were to be used as evidence since this fact could readily have been discovered during the hearing process. The affidavits of West and Eric S. Vogel, Station KISW Program Director, submitted as part of Kaye-Smith Exhibits 16 and 17 represented that they had explained to each of the affiants that his or her testimony would be used as evidence in this proceeding. In a few cases, these 2 individuals failed to inform the affiants of the fact that these testimonial letters were to be submitted as part of the Commission's proceeding. This appears to have been an oversight.

[42] See, also, *Merrimack Valley Broadcasting, Inc.*, ____ FCC 2d ____, FCC 83-465, released October 13, 1983.

which one of these mutually exclusive proposals would, on a comparative basis, better serve the public interest.

7. In making the comparative choice, it is appropriate to keep in mind the objectives of the comparative process. The Commission in its *Policy Statement of Comparative Broadcasting Hearings*, 1 FCC 2d 393, 398 (1965), emphasized that the two primary objectives to be accomplished in making the comparative choice are to achieve maximum diffusion of control over the media of mass communications and to obtain the best practicable service to the public.

8. Turning to the comparative factor of diversification, it is noted that Hoffart has no media interest and that Kaye-Smith is the licensee of Stations KXI-AM and FM, Portland, Oregon and Stations KJRB(AM) and KEZE-FM, Spokane, Washington. Portland and Spokane are located, respectively, 142 and 237 miles from Seattle. Both of these markets have numerous media of mass communications. Hoffart deserves to be awarded a preference in this area of comparative evaluation. However, the Commission recently ruled that diversification is not a factor of primary importance in a proceeding involving a renewal applicant and a permit applicant. *Radio Station WABZ, Inc.*, 90 FCC 2d 819, 831 (1982) The Commission explained that to accord diversification primary significance in the comparative renewal context might result in an overall restructuring of the industry and widespread disruption of service to the public. The weight to be accorded to Hoffart's preference for diversification will be determined in the overall comparative evaluation of the applicants.

9. Effectuation of the best practicable service to the public objective entails the appraisal of the proposed participation of the applicants' principals in the operation of the proposed facilities. Also, as detailed, *infra*, since a renewal applicant is involved, the past record of Station KISW during the license period may be evaluated. Lester M. Smith, Executive Director of Station KISW and owner of 20% of the stock, proposes to devote 30 hours a week to supervising the operation of Station KISW. Smith will make all policy decisions concerning the station and will exercise ultimate managerial authority over the programming and operation of the station. Hoffart, a resident of Spokane, a city approximately 240 miles distant from Seattle, proposes to devote fulltime to the operation of the proposed station. He proposes to come from Spokane on a weekly-basis for the initial year of operation, leaving Spokane on Monday morning by air or automobile and returning on Friday afternoon. It is clear that Hoffart's 100% fulltime integration proposal is superior to that of Kaye-Smith's, which represents integration by a 20% stockholder on the basis of 30 hours a week. However, Kaye-Smith's modest integration proposal is enhanced by the fact that Lester M. Smith is a resident of the

Seattle area and has been active in a number of local civic and charitable organizations. Additionally, Smith has extensive experience in the management and operation of broadcast facilities. In contrast, Hoffart, a resident of Spokane, will be commuting on a weekly basis to Seattle where he has not had any participation in Seattle civic and charitable organizations. Nor has he any management experience relative to the operation of a broadcast facility.[43] It is ruled that Hoffart is entitled to a preference in this area of comparative evaluation. As was the case with diversification, the weight to be accorded Hoffart's preference for integration will be determined in the overall comparative evaluation of the applicants.

10. It is now appropriate to evaluate the past broadcast record of FM Station KISW during the license period. It is ruled that, for the reasons articulated, *infra*, the record warrants the holding that Station KISW's past performance has been meritorious. Kaye-Smith conducted an ongoing ascertainment of the community problems, needs and interests during the license period by contacting numerous community leaders and conducting random public surveys. Most important, Station KISW addressed issues of interest to the area through regular scheduled news, public affairs, other non-entertainment programs and public service announcements. The findings have detailed the extent to which Station KISW's programming evidences its community envolvement. Its non-entertainment programming exceeded the amount promised in its earlier filed renewal application. Its locally produced *Sunday Morning Live* and *Sixty Seconds* addressed community problems. Additionally, the *Jonathan Field & Friends* program, which was recorded, also addressed many of these problems.[44] It is ruled that Station KISW non-entertainment programs were responsive to the need of Seattle. It provided news during the Monday through Friday period of each week and kept its youthful audience informed as to local, regional and national events. The public affairs programs were aired on Saturday and Sunday mornings at times of active radio listenership in the Seattle area. The station's other non-entertainment programs included locally produced news of civic, cultural and recreational events as well as programs which dealt with social, political, economic and moral problems facing its young audience.

11. Station KISW's reputation in the community is noteworthy. There is no indication that the station received any complaints during the license period. The evidence establishes that letters from various community leaders were received throughout the license period commending the station for its public service programming. The Mayor of Seattle expressed the view that Kaye-Smith showed "strong, effective commitment to broadcasting in the public interest." Others expressed the same

[43] Hoffart's experience is limited to engineering matters relative to station operation.

[44] See paragraph 33, *supra*.

view and many noted that Station KISW provided the listeners with the information that was pertinent to their age and life style. Certainly, these local leaders and members of the public were in the best position to judge the performance of Station KISW. They all attested to Station KISW's high quality of service to the community and commended it for its locally originated programs and its cooperation with the local service organizations. Station KISW has demonstrated a commitment to serving the community which is above a level of mediocre service which might minimally warrant renewal. The record evidence warrants characterizing Station KISW's service as meritorious, resulting in the assessment of a strong comparative preference.

12. Both the Commission and the Courts have recognized that a broadcaster's past performance is the most reliable indicator of his future performance. The Courts have endorsed the Commission's practice of according primary significance to this factor in a comparative renewal proceeding and have indicated that a licensee who has rendered meritorious service can be reasonably confident of renewal. *Citizens Communications Committee v. Federal Communications Commission*, 447 F. 2d at 1208; *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805 and n 25 (1978). The Commission has stressed that a substantial record of service is to be translated into a comparative preference to be weighed against other factors and that this preference is entitled to more weight than "structural factors" such as integration and diversification.[45] The Commission has made clear that it is appropriate to prefer a renewal applicant with a meritorious record over a challenger with preferences relative to integration and diversification.[45] It is ruled that Hoffart's advantages under diversification and integration together with the slight demerit accruing to Kaye-Smith relative to the "notarial imperfections" incident are insufficient to overcome the substantial preference awarded to Station KISW for its past broadcast record.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion, in accordance with Section 1.276(d) of the Rules, 47 CFR 1.276(d)[46], the application of Dena Pictures, Incorporated and Alexander Broadcasting Company a Joint Venture d/b/a Kaye-Smith Enterprises for renewal of license for Station KISW, Seattle, Washington,

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[45] *Radio Station WABZ, Inc.*, cited *supra*.

[46] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release, pursuant to 47 CFR 1.276(d).

IS GRANTED and the application of Vincent L. Hoffart d/b/a Hoffart Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Assistant Chief Administrative Law Judge*

Attorney As Witness
Attorney, Removal From FCC Hearing
Interlocutory Ruling Appeal From

Review Board overturned ALJ's interlocutory ruling requiring withdrawal of counsel's firm where counsel was to be a witness in proceeding. Board noted the reasons underlying the rule on which removal was based did not appear sufficient to outweigh the benefit of allowing applicant counsel of its choice.
—*Miller Broadcasting, Inc.*
BC Docket No. 82-807

FCC 84R-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
Miller Broadcasting, Inc. Lawrence, Kansas	BC Docket No. 82-807 File No. BPCT-820615KH
V. Sturwold et al d/b/a Kansas Family TV, Ltd. Lawrence, Kansas	BC Docket No. 82-808 File No. BPCT-820819KE
Denning Santee Communications, Inc. Lawrence, Kansas	BC Docket No. 82-810 File No. BPCT-820824KM
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 1984; Released: July 16, 1984

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed as of right by Kansas Family TV, Ltd. (Kansas Family) on May 23, 1984, from a

ruling by Administrative Law Judge Byron E. Harrison (FCC 84M-2086, released May 2, 1984) disqualifying the law firm of Seymour M. Chase, P.C., from further participation as its counsel of record in this proceeding.[1] The ALJ's ruling was predicated on a finding that Mr. Chase will be an essential witness on issues specified in this case, within the meaning of Disciplinary Rule 5-102(A) of the American Bar Association Code of Professional Responsibility, which generally requires withdrawal of counsel when they or members of their firm will be called as witnesses in pending litigation. For the reasons set forth below, we will grant the appeal.[2]

2. Disciplinary Rule 5-102(A), (DR5-102(A)), reads as follows:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101(B)(1) through (4).

The ALJ concluded that disqualification was required here under DR5-102(A) because Mr. Chase's testimony would be of utmost materiality on four potentially disqualifying issues added against Kansas Family and because Kansas Family had failed to demonstrate that it met any of the exceptions under the rule.

3. In its appeal, Kansas Family does not dispute the ALJ's finding that Mr. Chase is an essential witness or that DR5-102(A) generally requires withdrawal by counsel in such circumstances. Nor does it dispute that DR5-102(A), which in pertinent part has been adopted by the District of Columbia Bar, is applicable to Mr. Chase and his firm. Rather, it contends that the "substantial hardship" and "distinctive value" provisos of the DR5-101(B) subsection (4) exception are applicable here. That subsection permits a lawyer to maintain dual roles as advocate and witness "if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." Appellant asserts that it would incur a substantial financial hardship if it is required to secure new counsel. Additionally, appellant argues that Mr. Chase's participation in this case has acquainted him with a mass of knowledge that makes his services of distinctive value. Finally,

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[1] The appeal was filed pursuant to Section 1.301(a)(5) of the Commission's Rules, 47 CFR § 1.301(a)(5). By letters dated May 15 and 16, 1984, respectively, the Board extended the time for filing the appeal.

[2] Acknowledging that the presiding ALJ refused permission for leave to appeal his order adding the issues, appellant urges the Board on its own motion to order the parties to file briefs on this matter. We decline appellant's invitation. *See* Section 1.301(b) of the Commission's Rules, 47 CFR § 1.301(b); *also see Communications Satellite Corp.*, 32 FCC 2d 533, 534, 23 RR 2d 286, 288 (1971).

appellant urges the Board to interpret DR5-101(B)(4) in light of the trend towards liberalization of the rule, and, in this regard, attaches a copy of Opinion No. 44 of the Committee on Legal Ethics of the District of Columbia Bar, which, it claims, suggests that the predominant purpose of DR5-102 is to protect clients and that this protection can be waived. Appellant submits that by its brief and attached affidavit it has waived the protection. Miller Broadcasting, Inc. and Denning Santee Communications, Inc., the other applicants in this proceeding, oppose Kansas Family's appeal.

4. We will grant the appeal. In so doing, we do not criticize the ALJ's analysis below[3]; rather, in light of the appellant's unequivocal declaration that it desires to retain its present counsel despite the risks associated with that decision, and of the nature of the proceeding involved here, we conclude that an automatic application of the prohibition "might . . . be productive of more harm than good, by requiring the client and [the adjudicative] system to sacrifice more than the value of the presumed benefits." *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288, 1293 (2nd Cir. 1975). Our analysis begins with the bedrock proposition that a litigant should be able to select the counsel of his choice in the absence of compelling countervailing considerations. *See Botaro* v. *Hatton Associates*, 680 F.2d 895, 897 (2d Cir. 1982). This principle would appear to be particularly applicable in comparative broadcast licensing proceedings such as this where an applicant has freely entered into competition with other applicants to gain a valuable right to utilize the public airwaves via the operation of a broadcast facility. This is not a criminal case (to which the Disciplinary Rule applies without distinction) where a defendant might lose life, liberty, or property through faulty counsel. Nor is it an

[3] We agree with the ALJ that appellant failed there to demonstrate that removal of counsel would work a substantial hardship on it because of the latter's distinctive value in this proceeding. The proceeding involves only three applicants and, contrary to appellant's suggestion, does not appear to be significantly more complex than the usual comparative television broadcast proceeding. Certainly, the presiding ALJ, who is presently closest to the case, did not consider this proceeding to be unduly complex when he rejected Kansas Family's claim of hardship. *See* FCC 84M-2086, *supra*, at para. 10. Hence, it appears that the only "distinctive value" appellant is claiming for counsel here is his familiarity with the case, an element which should always be present and which, if considered sufficient to support retention of counsel, would vitiate the substance of DR5-102(A). As to appellant's claim of financial hardship, potential injury would not appear to be a basis for triggering this exception to DR5-102(A) because the hardship experienced by the client must be caused by the distinctive value of its counsel. In any event, appellant failed to submit specific information to the ALJ or the Board showing that expenses anticipated for new counsel would be a substantial hardship on it. Finally, the ALJ was never afforded an opportunity to pass upon Kansas Family's waiver argument, which we consider crucial, since it was first raised on appeal. *Wind River Communications, Inc.*, 55 RR 2d 579 (Rev. Bd. 1984), cited by Miller, is not directly apposite because no waiver argument was made in that case.

ordinary civil case where a defendant might be drawn involuntarily into a battle with critical stakes. This is an administrative hearing where the client voluntarily seeks a privilege. Error of choice of counsel here may result in loss of the contest, but it is the applicant who should be free to decide whether, in its particular case, particular counsel is to its advantage.

5. That is not to say that the ordinary rules of attorney conduct do not apply to our proceedings. But, the District of Columbia Bar Ethics Committee has considered the underlying purposes of DR5-102 in its Opinion No. 44, and concluded that the rule is designed primarily to protect the client (*i.e.*, because an attorney-witness can more easily be impeached for interest) and that the client, being the beneficiary of that rule, can properly waive its protection.[4] In the instant case, the general partner of Kansas Family has averred in an affidavit that she is aware of the rule and its purposes, that she has discussed the matter with Mr. Chase, and that she still wishes to have Mr. Chase's firm as its counsel of record. The Ethics Committee's opinion goes on to consider other purposes of the prophylactic rule, and dismisses two arguments often made for the rule's existence: *viz.*, assisting opposing counsel who might otherwise be handicapped in challenging the credibility of a witness who is also an advocate for a party; and protecting the dignity of the legal profession (*i.e.*, "if lawyers are permitted to testify on behalf of their clients, the public may erroneously believe lawyers will alter their testimony to suit the interests of those clients"). The Board agrees that these rationales are weak. For example, we note that both problems also exist in *pro se* proceedings, but no one suggests that in those cases the applicant should be prohibited from representing himself. *See also International Electronics Corp.* v. *Flanzer, supra*, 527 F.2d at 1294. The only other underlying concerns referred to in Opinion No. 44 are not compelling here: (1) "the awkwardness and seeming impropriety that can exist when attorneys conduct examinations of themselves at trial"; and (2) the danger that the trier of fact, especially if it is a jury, may give weight to statements by the advocate-witness that are in reality mere argument. Mr. Chase's firm has other attorneys who can question Mr. Chase when he appears as a witness, and the trier of fact here is not a jury but an experienced ALJ who can separate argument from evidence. In sum, the reasons supporting withdrawal of counsel under DR5-102(A) do not appear sufficient to outweigh the ordinary right of allowing the applicant

[4] While we do not believe that the factual situation in Opinion No. 44 is on all fours with our situation (there a law firm was itself the litigant), the D.C. Bar opined: ". . . since the client is the beneficiary of this protection, we believe that the client can properly waive it. This conclusion is reinforced by the strong societal interest that exists in allowing clients to choose their own advocates. . . ."

counsel of its choice. Opinion No. 44, D.C. Bar. If Kansas Family were not aware of the pitfalls of its choice before this appeal, it certainly is now. While we ourselves might consider the potential conflict with counsel to be an unnecessary litigative risk, or even foolish, the first choice belongs to Kansas Family. It will not later be heard to complain that it was denied due process if it does not alter its choice.

6. Further, we point out that should the conflict between Mr. Chase's roles as witness and advocate become irreconcilable as the hearing unfolds, Kansas Family is free to extricate itself from counsel at that time. And, the ALJ, who is presiding over the proceeding, will be in a position to monitor any impossible conflict as the hearing proceeds. Finally, we underscore that the primary responsibility for avoiding conflict reposes with counsel, and we expect counsel to withdraw forthwith if even a hint of actual conflict with its client ensues. *See also* DR5-101(A).[5]

7. ACCORDINGLY, IT IS ORDERED, That the appeal, filed May 23, 1984, by Kansas Family TV, Ltd. IS GRANTED, and the ruling set forth in *Memorandum Opinion and Order*, FCC 84M-2086, released May 2, 1984 disqualifying Mr. Chase and his law firm and directing Kansas Family to enter new appearance of counsel IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[5] That Rule provides: "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

Common Carrier, Contract With Another Carrier
Common Carrier, Interconnection
Common Carrier, Rates, Charges
Common Carrier, Revenue Requirements

Order adopted providing for continuation of status quo on interim intercarrier revenue-division arrangements and interconnections for other Common Carriers during review of exchange access tariffs. Decision to reexamine rates of return for American Telephone and Telegraph Co. and exchange carriers.
—*MTS/WATS Market Structure*
CC Docket No. 83-1145

FCC 84-106

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of	
Investigation of Access and Divestiture Related Tariffs	CC Docket No. 83-1145 Phase I
MTS and WATS Market Structure	CC Docket No. 78-72 Phase I

MEMORANDUM OPINION AND ORDER

Adopted March 28, 1984; Released March 28, 1984

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING

I. Introduction

1. In the order released February 17, 1984 (FCC 84-51) (*ECA Tariff Order*), we directed carriers in the National Exchange Carrier Association (ECA) to file revised access service tariffs conforming to that order no later than March 15 to be effective April 3, 1984 (para. 90). The ECA filed revised tariffs on March 15. In the order released March 7, 1984 (Mimeo No. 2802), the Common Carrier Bureau directed exchange carriers that had filed separate access service tariffs (non-ECA tariffs) to file revised tariffs conforming to that order no later than March 19 to be effective April 3, 1984 (para. 13). These exchange carriers filed revised tariffs on March 19. These orders provided authority for the tariffs to go into effect

on less than the statutory notice period of ninety days, pursuant to 47 U.S.C. § 203(b) and 47 C.F.R. § 61.58.

2. About two dozen parties urged us to reconsider and/or stay our schedule for the filing and review of the revised tariffs.[1] They claimed that a longer notice period was necessary for interested parties to analyze those tariffs to determine whether some provisions were unlawful. We also received an emergency petition filed by American Telephone and Telegraph Co. (AT&T) (February 27) for partial reconsideration of portions of the Commission's decision released February 15, 1984 in Docket CC 78-72, Phase I (MTS and WATS Market Structure, FCC 84-36) (*Further Reconsideration Order*) and the February 17, 1984, decision in Docket CC 83-1145, "which impose upon AT&T the exchange companies' revenue loss caused by the requirement that OCCs pay 55 percent less than AT&T for their access."[2] In their comments and reply comments on

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[1] Petitions requesting an extended notice period were filed by the Ad Hoc Telecommunications Users Committee (Ad Hoc) and the Western Union Telegraph Co. (Western Union). Additional petitions and comments in support of the Ad Hoc and Western Union petitions were subsequently filed by Aeronautical Radio, Inc. (ARINC), the American Broadcasting Companies (ABC), CBS, Inc. (CBS) and the National Broadcasting Company (NBC), the Association of Data Processing Service Organizations (ADAPSO), the Association of Long Distance Telephone Companies (ALTEL), the Associated Press and Commodity News Services, Hughes Television Network, International Communications Association, ITT Communications Services, J.C. Penney Co., MCI Telecommunications, the National Association of Broadcasters, RCA Communications, Reuters Limited, Satellite Business Systems (SBS), Telesphere Network (TNI), TRT Telecommunications, the Utilities Telecommunications Council, U.S. Telephone, Inc. (USTEL) and Westinghouse Broadcasting and Cable, Inc. (Group W). AT&T has also filed comments in favor of deferring the effective date of the access service tariffs, but not for as long as has been requested by Ad Hoc and Western Union. Petitions and comments in opposition to the Ad Hoc and Western Union petitions were filed by The Ameritech Operating Companies (Illinois Bell Telephone Co., Indiana Bell Telephone Co., Michigan Bell Telephone Co., The Ohio Bell Telephone Co. and Wisconsin Bell), Bell Communications Research, Inc., the NYNEX Companies (New York Telephone and New England Telephone & Telegraph Co.) and the United Telephone System, Inc. Reply comments were filed on March 16.

[2] AT&T contends that the interactive effect of these orders unlawfully discriminates against AT&T and results in an unlawful confiscation of its property. AT&T's petition includes an attachment presenting AT&T's projections of interstate revenues, expenses, and rate base for 1984. As a remedy, AT&T seeks a reduction in the OCC discount and an order barring exchange carriers from collecting from AT&T any revenue shortfall occasioned by that discount. On February 28, the Commission issued a public notice which requested comments on the AT&T petition by March 9, with reply comments by March 16. On March 2, the Chief, Common Carrier Bureau directed AT&T to respond to detailed questions about its forecasting methodologies and underlying data. More than 250 comments and reply comments were filed, most of which oppose the relief AT&T seeks. Many commenters question or oppose virtually every aspect of the AT&T petition and its supporting materials. A central issue addressed in many comments is whether AT&T's projections of revenues and expenses for 1984 are likely to prove accurate, particularly when compared with the projections contained in AT&T's 1983 tariff filings. With respect

AT&T's emergency petition, the National Telecommunications and Information Administration (NTIA) and International Communications Association (ICA) urge us to reexamine and decrease promptly the current interstate authorized rate of return on rate base of 12.75%, which we established in 1981. In their reply comments, various exchange carriers oppose any effort to order a new interim prescription for rate of return or to lower the currently authorized rate of return.

3. In view of the considerations discussed in our order of March 20, 1984, and this order, we found that the public interest would be harmed by allowing the interstate access service tariffs to become effective on April 3. Initial analysis of these tariffs and the other materials submitted has shown that several of the major concerns identified in our orders of February 17 and March 7 and in the information request of February 24 have not been satisfied. Pursuant to our discretion and authority under Section 203(b) of the Communications Act of 1934, as amended, we decided on March 20, 1984, to modify the notice period for all the provisions of the ECA and non-ECA tariffs, extending the effective dates for the tariffs from April 3 to June 13, 1984. This extension gives ninety-days notice on the ECA tariff and 86-days notice on non-ECA tariffs. This action gives parties greater opportunity to comment on the revised tariffs. We hope that access tariffs can go into effect, in whole or part, prior to June 13, and the March 20 order established an expedited comment schedule to facilitate achievement of that goal.

II. Modified Notice Period

4. The interstate access service tariffs under investigation in Docket CC 83-1145 were filed by the ECA and 74 other exchange carriers on October 3, 1983, and were to become effective on ninety days notice on January 1, 1984. Under this schedule, the effective date of the access tariffs would have coincided with the AT&T divestiture; the tariffs would have implemented the access charge environment anticipated by both the

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to particular major expense elements, some commenters challenge AT&T's estimates that maintenance expenses will increase by $327 million over 1983 estimates while AT&T's estimate of net plant in service dropped by 10%. Other commenters question the reasonableness of projections showing substantial increases in access charges ($1.878 billion), general ($.194 billions), and other expense elements. With respect to forecasts of revenues, AT&T's econometric models project a sharp reduction in domestic MTS revenues ($1.350 billion). Commenters sharply criticize the forecasting model's variable specification and design, stability, inclusion and non-inclusion of data, and the probative value which should be accorded to any estimates derived from AT&T's models. Commenters also question AT&T's contention that it cannot increase rates and revenues for tariffed services and argue that the price elasticity data AT&T filed do not support its petition.

Commission's *Access Charge Orders*[3] and by the *Modification of Final Judgment.*[4] Our initial review of the tariffs, however, revealed substantial issues of lawfulness requiring investigation. Accordingly, on October 19, 1983 (FCC 83-70), we suspended all of the access and divestiture related tariffs, set a new effective date of April 3, 1984, and began an investigation.

5. Over 50 interested parties filed comments on the rates, rate structures and terms contained in the interstate access service tariffs. The Commission's review of the tariffs, together with analysis of the comments and reply comments, culminated in the issuance of two orders, each more than 400 pages, which found the tariffs filed on October 3 to be unlawful, gave the carriers specific directions for revising the tariffs so as to comply with our rules, and set an effective date for revised tariffs—to be filed on March 15 and 19—of April 3.[5]

6. The Emergency Petitions for Reconsideration and Petitions for Stay filed by Ad Hoc, Western Union and other parties[6] are essentially limited to the issue of whether the interval between March 15 and April 3 is sufficient to allow thorough review of the refiled tariffs. Ad Hoc, for example, argued that this notice period was insufficient to permit meaningful Commission review of the tariffs and would deprive interexchange carriers and their customers of their right to be heard as to the lawfulness of the refiled tariffs. Specifically, Ad Hoc argued that, as a result of the Commission's *Further Reconsideration Order* and *ECA Tariff Order*, the refiled tariffs will be substantially different from those originally filed in 1983. Therefore, in its view, the refiled tariffs will amount to a new tariff filing, requiring a full ninety-days notice period under Section 203 of the Communications Act.[7]

7. Western Union's petition presented a similar argument specifically directed at the special access portions of the tariffs. It argued that the refiled tariffs will be completely changed after the Commission's finding

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[3] MTS/WATS Market Structure (CC Docket No. 78-72, Phase I), 93 FCC 2d 241 (1983), *modified on reconsideration*, FCC 83-356 (released August 22, 1983), *modified on further reconsideration*, FCC 84-36 (released February 15, 1984) (*Further Reconsideration Order*).

[4] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S.Ct. 1240 (1983).

[5] *See* para. 1 *supra.*

[6] *See* n.1 *supra.*

[7] Section 203(b)(1) of the Communications Act states:

> No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

47 U.S.C. § 203(b)(1).

in the *ECA Tariff Order* that the original special access rate structure was unlawful. The refiled tariffs, it claims, will be at least as complex as the original filings, not fine-tuned versions of those already investigated. [8]

8. Parties filing in opposition to Ad Hoc's and Western Union's petitions argued that the interexchange carriers and other members of the public have had ample opportunity to comment in detail on the access tariffs since the initial filings. They claimed that, given the Commission's close scrutiny of the tariffs and the precise directions imposed by the *ECA Tariff Order*, and given the importance of implementing the new tariff structure, there was no reason to postpone, again, the date of effectiveness. According to these parties, the refiled tariffs would not trigger a ninety-day notice period under Section 203(b)(1) of the Communications Act because that section applies only to new tariffs. The refiled tariffs, in their view, are not new, but are instead merely compliance filings. Moreover, they claimed that even if the ninety-day notice period does apply to these tariffs, the Commission has authority under Section 203(b)(2) of the Act to modify the statutory notice requirement as a matter of discretion, for good cause shown. 47 U.S.C. § 203(b)(2).

9. *Discussion.* In the *ECA Tariff Order*, we concluded that the filed access tariffs were functional vehicles for implementing the Access Charge Plan, but changes were required in many specific provisions and the structure proposed for Special Access was unreasonable and unlawful. Further information was also needed on the cost and rate developments to enable us to evaluate the reasonableness and accuracy of this process and of the rates themselves. In particular, it was impossible on the basis of the filed support information to assess the 1984 Budget and Company Views, which were ostensibly based on actual 1982 data adjusted to reflect divestiture, growth, and other factors. Because these views were the basis of all the BOC costs, revenues, and rates, it was indispensable that their development be fully explained and documented.

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[8] Western Union also claims that, under the Docket 20099 Settlement Agreement, it is entitled to a six-month notice period before filed rates become effective. *See* AT&T, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v. FCC, 539 F.2d 242 (D.C. Cir. 1976). We considered, and rejected, this argument in the *ECA Tariff Order* at para. 50. Although we continue to believe that the OCCs have been afforded the notice contemplated in the Docket 20099 Agreement, some parties, including Western Union, dispute this position. Out of an abundance of caution, interested parties should address whether the Agreement continues to be in the public interest, accepting *arguendo* Western Union's legal analysis. Changes in the telecommunications industry, regulation, and the history and importance of these tariffs may weigh against viewing this Agreement as in the public interest. Commenters may wish to address whether continuing the six-month notice requirement would impose excessive burdens on other ratepayers and impair competition. *See* FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). Comments on this issue are due April 16, with reply comments due April 30, 1984.

The ECA and BOCs were requested to provide the necessary additional support information by letter from the Common Carrier Bureau dated February 24, 1984.

10. Although we recognized that the needed revisions would entail substantial changes in the filed tariffs, and that the further support information would require careful analysis, we hoped to be able to make an initial review of the revised tariffs and the support information during the period after the March 15 and 19 filing dates to determine if the tariffs might be allowed to become effective April 3. We have begun this initial review. The ECA has in very substantial part made the revisions we found necessary and complied conscientiously with the *ECA Tariff Order*. The additional support information also provides a much better picture of the rate development, although certain gaps remain. For example, the claimed effects of divestiture and subsequent projected growth were shown for only thirty-three of fifty-one study areas, comprising approximately two-thirds of all BOC Plant in Service.

11. Nevertheless, there are significant problems. Some additional tariff provisions are proposed but not explained or justified, for example a provision relating to the offering of presubscription. Some revised provisions are complicated and unclear. More importantly, the additional data contains obvious errors and inaccuracies. It is not clear whether some of these were reflected in rate calculations.[9] Some of the calculations, however, seem clearly to overstate the BOC revenue requirements. For example, aggregate BOC Plant in Service (excluding CPE) increased by only 11.0 percent in the year and a half from midyear 1982 to yearend 1983 according to actual figures reported to the FCC. The BOC Budget Views, however, are based upon projected growth from midyear 1982 to midyear 1984 (*i.e.*, an additional six months) of 18.0 percent. To achieve 18.0 percent two year growth would require an annualized growth rate of 13.0 percent in the remaining six months for which actual figures are not yet available. This projected growth rate is higher than any Plant in Service growth rate for at least the last seventeen years and much higher than the growth rates of 8.1 and 6.8 percent experienced by all BOCs in 1982 and 1983. If the actual growth trend of 11.0 percent for one and a half years were extended to June of 1984, the two year projected growth rate would be 15.0 percent. The 3.0 percent difference between this estimate and that of the BOCs used in the Budget View represents approximately $3.642 billion. In addition, the BOCs have in general

[9] For example, because of apparent clerical errors, Mountain States Telephone reports a post-divestiture *increase* in its Total Plant in Service in New Mexico from $837 million to $3.411 billion. The BOCs also inconsistently reported their pre-divestiture Customer Premise Equipment figures, rendering aggregate 1982 totals and separations factors incorrect. Aggregate 1983 Total Plant in Service is also misstated.

projected increases in the percentage of plant allocated as interstate since the 1982 post-divestiture views. These allocations would further increase interstate plant and revenue requirements without clear justification. Although we are continuing to examine the cost support and the additional information (which also provides the first adequate opportunity for public scrutiny of the rate development), this initial review already indicates that the costs, revenue requirements, and hence the rates may be overstated.

12. If there is overstatement in this area, adjustment could alleviate the grevious impact projected by AT&T, Western Union and others. Based on its preliminary analysis of the revised Special Access sections of the ECA tariff, Western Union asserts that charges imposed on it would be even higher than under the earlier, unlawful provisions. Its total annual charges under the October 3, 1983, filing would have been $118 million, an increase of 371 percent over its present charges of $25 million. Western Union calculates that its annual charges would be $156 million under the March 15 ECA tariff. This would be a 525 percent increase over the present charges. (Reply of the Western Union Telegraph Company, Docket CC 83-1145, Phase I, March 16, 1984, attachment.) This substantial further increase is at a minimum puzzling because AT&T has also stated that charges imposed on it would increase. Yet the filing itself purportedly only restructures Special Access without increasing the revenues targeted by the October 3 rates. Moreover, as we noted in the *ECA Tariff Order*, para. 50, individual customers reported dramatic increases in Special Access rate levels under the October 3 tariffs. These increases ranged up to 11,000 percent. Included among the users expressing concern over the huge increases were Dow Jones, Musak, American Library Association, universities, press associations, and radio and television networks. Concerns that private line increases may drive these entities out of business, or at least make telecommunications so unaffordable as to alter their primary business, require this Commission to be diligent in reviewing the cost information submitted in justifying any rate increase. These concerns have not abated with the filing of new tariffs.

13. *Special Access.* In the February 17 and March 7 orders, we identified special access as an area of primary concern. We pointed to aspects of the special access provisions which were unreasonable, discriminatory, and violative of Commission decisions and policies. We ordered the carriers to replace those provisions and gave guidance for the development of lawful provisions. In addition, we noted that further information and, most likely, further investigation would be needed to probe the development and justification for these rates. By letter of the Chief, Common Carrier Bureau (February 24, 1984), we requested the exchange carriers to provide by March 15, *inter alia*, specific information

necessary to meet their burden of proving that the proposed special access rate increases are reasonable.

14. A number of petitioning and commenting parties argue that they must be given an adequate opportunity to review and file comments on the special access provisions before the tariffs become effective. Extension of the effective date for the special access provisions beyond April 3 will allow them to review those provisions carefully and to file helpful, accurate comments. Our preliminary review shows that the special access provisions filed on March 15 and 19 are substantially different from those filed in 1983, and there may be some areas in which the special access provisions do not comply with our orders. In addition, it appears that the revised tariffs provide for large increases from the rates some customers pay under currently-effective tariffs. These customers should be given an adequate opportunity to analyze and comment on the revised tariffs. The extended notice period for parties to file new comments on the revised special access provisions will help ensure that these provisions are generally reasonable and workable before they are allowed to take effect.

15. We seek to avoid unnecessary delay in reviewing the revised special access provisions, recognizing that currently-effective tariffs and interim intercarrier revenue-division arrangements may be at tension with the approach of the *Modification of Final Judgment,*[10] and that the revised special access provisions are necessary to implement some features of the *Further Reconsideration Order* as well as the *MFJ.* Therefore, we are striving to have new tariffs take effect as soon as possible to replace the interim intercarrier arrangements, implement our access charge rules, and promote the public interest in other ways. Our decisions in Docket CC 83-1145 have attempted to speed the effective date for new, lawful tariffs by providing specific guidance and a short time for refiling tariffs. Yet, as we explained in our order in this proceeding that was released on December 29, 1983 (FCC 83-568), allowing questionable special access provisions to go into effect with an accounting order is not a viable alternative to delaying their effective date. See also para. 12 *supra.* Comments should be filed expeditiously so that we can decide whether to allow all or parts of the special access provisions to go into effect on or before June 13, to reject all or parts, or to prescribe. 47 U.S.C. §§ 204-205. Our March 20 order established that comments are due on the special

[10] *See* United States v. Western Electric Co. and American Telephone and Telegraph Co., Civ. Action No. 82-0192, Misc. No. 82-0025 (PI)(filed Dec. 1, 1983). We fully acknowledge Judge Greene's concern that the access tariffs be implemented expeditiously. At the same time, we are certain that the Court would share the concern that we have in fulfilling our regulatory responsibility that the tariffs be generally reasonable and workable before they take effect. For example, the Court has made clear on several occasions its concern that access tariffs be reasonable and work no undue hardship on the telecommunications using public.

access provisions on April 16, 1984, which is 32 days after the ECA tariffs were filed and 28 days after the non-ECA tariffs were filed. While this is less time than we allowed for comments on the 1983 tariffs, review of those tariffs and the orders in this proceeding will, we believe, permit interested parties to analyze and file comments more quickly on the revised tariffs. Reply comments are due April 30, fourteen days after the comments.

16. *Other Tariff Provisions.* The orders of February 17 and March 7 also directed the exchange carriers to revise provisions of the access tariffs other than those specifically for special access. These include provisions dealing specifically with switched access service, as well as general provisions applying to both switched and special access services. If the exchange carriers followed the guidance in the orders, it is likely that the definitions, rate structures, and most terms for switched access in the revised tariffs will be just and reasonable. But, our preliminary review of the revised tariffs has revealed some departures from the orders in these provisions. We recognize that delay of the switched access provisions will delay implementation of end-user charges for multiline business customers and the revised discount for Other Common Carriers ordered in the *Further Reconsideration Order,* and require some interim arrangements for switched as well as special access. Nevertheless, a notice period extending beyond April 3 appears necessary for interested parties to analyze and prepare comments on these provisions and on the cost justification for the proposed rates in light of the data filed in response to our information request. Also, the extended period will allow the Commission to direct the exchange carriers to change any provisions which fail to comply with our orders or otherwise are unlawful. We intend to complete our review of these other provisions expeditiously, and if possible, permit them to become effective prior to June 13. Pursuant to our March 20 order, interested parties may file comments on the provisions of the ECA and non-ECA tariffs other than those specifically dealing with special access on April 9, with reply comments due on April 24. This reply period may be shortened or eliminated by subsequent order after initial review of the tariffs and the April 9 comments. We hope that, with the cooperation of the exchange carriers in changing any provisions which appear unlawful, we can allow the provisions other than those specifically dealing with special access to go into effect within the next several weeks.

17. *Interim Arrangements.* Interim arrangements appear necessary to accommodate the extended notice period. We find that currently-effective interim intercarrier revenue-division arrangements for all interstate services should continue in the interim period until the Commission allows revised tariffs to go into effect, orders some change in the

arrangements, or the participating carriers reach other interim agreements. Judge Greene has approved a waiver of the *MFJ* for these arrangements only through April 3. Extension of these arrangements may require the parties to the antitrust agreement to seek further waiver of the *MFJ* as they believe appropriate. It will also delay any change in revenues that exchange carriers could realize through new tariffs. These considerations and others reinforce our commitment to rapid tariff review and short interim intercarrier arrangements. At the onset of the Docket CC 83-1145 investigation, the Commission gave notice that it would prescribe tariff arrangements if that action became necessary. The March 20 decision to extend the notice period established a new interim period extending 72 days or less beyond April 3. From the tenor of the debate concerning AT&T's Emergency Petition, it is clear that AT&T and the exchange carriers are unlikely to reach negotiated agreements for interim arrangements by April 3. Any possible interruption of service or drop in efficiency caused by the failure to extend existing arrangements or reach reasonable new agreements would be against the public interest, 47 U.S.C. §§ 151, 214. Accordingly, it is necessary for us to impose interim arrangements to prevent any lapse in service. *See Lincoln Tel. & Tel. Co. v. FCC,* 659 F.2d 1092 (D.C. Cir. 1981).

18. Pursuant to 47 U.S.C. §§ 154(i), 201(a), and 205(a), the Commission is authorized to establish divisions of charges for service provided by through routes. Also, we have the authority to declare unlawful and prescribe any practice in intercarrier contracts, 47 U.S.C. §§ 205(a), 211(a). We can indicate to carriers practices which appear reasonable. *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978). Of course, if we had suspended these tariffs, we could still allow "part" of them to take effect. 47 U.S.C. §§ 204(a), (b).[11] The fact that the tariff lapse is caused by the notice requirement of Section 203(b)—instead of a Section 204 suspension (which we hope we will not have to invoke)—does not mean we are powerless to require service to continue to be rendered and to impose charges therefor. The Commission has ample authority under Section 4(i) to "issue such orders, not inconsistent with [the Communications] Act, as may be necessary in the execution of its functions." *See Lincoln Tel., supra; Trans Alaska, supra.*

19. In view of the exigencies caused by the postponement of the effective date of the exchange carriers' tariffs, we find that the public

[11] Under Section 204(a), the Commission has the power to suspend a charge "in whole or in part." Section 204(b) was added to the Act in 1976, evidently to expand the Commission's latitude by authorizing us to allow part of a suspended charge to take effect (perhaps "on a temporary basis pending further order of the Commission") based upon a written showing by the carriers affected that "such partial authorization is just, fair, and reasonable." 47 U.S.C. § 204(b).

interest requires us to maintain the status quo as constituted in the existing intercarrier revenue-division arrangements, unless there are carrier agreements for extension or replacement of the present arrangements. These arrangements were mutually agreed upon by the participating carriers under circumstances substantially similar to the present situation. While it is apparent from the debate concerning AT&T's Emergency Petition that some exchange carriers feel they might fare better under different arrangements, experience of three months with these arrangements appears to show that each participating carrier is earning at least as much as it did in 1983; no participating carrier can claim that the existing arrangements are insufficient to cover its costs or confiscatory. Moreover, on the basis of our investigation so far in Docket CC 83-1145, we are confident that the existing arrangements fall within the requirements of reasonableness established in the Act. *See Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968). At this time, we simply do not have enough certainty about the numbers filed by the parties to find that arrangements departing from the status quo would be just and reasonable. Therefore, on the basis of the pleadings received from the participating carriers and the comments thereon received from other interested parties in this docket, we prescribe that—unless there is some new agreement among the participating carriers regarding replacements before April 3, 1984—the carriers participating in currently-effective interim intercarrier revenue-division arrangements must extend those arrangements until the Commission allows the revised tariffs to take effect, orders some change in the arrangements, or the carriers reach other interim agreements which are acceptable to the Commission.

20. A second interim arrangement may be necessary because of the expiration of tariffs and contracts reflecting the ENFIA agreement (e.g., BSOC Tariff FCC No. 8) or agreements for similar interconnections. *Exchange Network Facilities,* 71 FCC 2d 440 (1979), *ENFIA Extension Orders,* 90 FCC 2d 6, 90 FCC 2d 202, 91 FCC 2d 1079 (1982), 93 FCC 2d 739 (1983); *MCI Telecommunications Corp. v. FCC,* 712 F.2d 517 (D.C. Cir. 1983). Under these tariffs and contracts, exchange carriers provide interconnections for origination and termination of interstate MTS and WATS-like traffic carried by Other Common Carriers (OCCs). Resulting from an agreement among the carriers, BSOC-8 and possibly some other of these tariffs and contracts were filed with an expiration date of April 15, 1984. Because these interconnections must continue, exchange carriers are entitled to reasonable compensation for their services, *Lincoln Tel., supra,* 659 F.2d at 1108. It is beyond dispute that continuation of these interconnections for OCCs' services is in the public interest, as expressly required in several appellate court decisions. *MCI, supra; Lincoln Tel., supra; MCI Telecommunications Corp. v. FCC,* 561 F.2d

365 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978) (*Execunet I*); *MCI Telecommunications Corp. v. FCC,* 580 F.2d 590 (D.C. Cir.), *cert. denied,* 439 U.S. 980 (1978) (*Execunet II*). The *Further Reconsideration Order* ordered exchange carriers to provide non-premium switched access to OCCs for a 55% discount off their charges to AT&T for premium switched access. The tariffs filed on March 15 and 19 would raise the charges for OCC interconnections from about $235 per line per month under currently-effective ENFIA tariffs to about $362 per line per month. We are examining the exchange carriers' cost justification for these rates in light of the data filed in response to our February 24 request. Pursuant to 47 U.S.C. §§ 154(i), 201(a), and 205(a), the Commission is authorized to establish charges for carrier interconnections. Also, we can indicate to carriers what rates appear reasonable before they file tariffs that might otherwise be subject to unexpected suspensions. 47 U.S.C. § 204(a); *Trans Alaska, supra.* For purposes of an interim arrangement until switched access provisions go into effect, we will allow exchange carriers participating in the ENFIA and similar tariffs to refile these tariffs at the existing rates.[12] Refiling these tariffs with the existing rates will be consistent with our efforts to maintain the status quo during our tariff review.

21. As another interim arrangement, AT&T must continue its current financial support and arrangements with the National Exchange Carrier Association until such time as this association receives revenues in connection with the application of access charges.

22. *Authorized Rate of Return.* As stated in the February 17 and March 7 orders and in the February 24 letter, the support material filed with the October 3 tariffs did not contain adequate information to judge whether the claimed revenue requirements and specific rates were reasonable. A critical element in assessing the reasonableness of the rates for both switched and special access services is the rate of return on rate base used. The exchange carriers claim that their rates are set to earn 12.75% on interstate rate base in compliance with the Commission's prescription in May 1981. *AT&T: Modification of Prescribed Rate of Return,* 86 FCC 2d 221 (1981), *aff'd sub nom. United States v. FCC,* 707 F.2d 610 (D.C. Cir. 1983). The weighted average rate of return of 12.75% was derived from AT&T's capital structure at that time, a 17.4% cost of common and convertible preferred stock, an 8.8% embedded cost of debt (short, intermediate, and long term), a 7.8% cost of non-convertible preferred stock, and a zero cost of other financing sources. Through AT&T's interstate tariffs, division of revenues procedures within the pre-

[12] We would waive the data requirements of 47 C.F.R. § 61.38 for these tariffs. Also, we would allow them to go into effect on shortened notice by special permission pursuant to 47 C.F.R. § 61.58. These tariffs should be filed by April 9, 1984.

divestiture Bell System, and settlements procedures with independent telephone companies, this interstate prescription was applied to AT&T and most exchange carriers. AT&T's petition urges us to examine the level of charges it will pay under the exchange access tariffs, which is influenced by the rate of return those tariffs are targeted to earn. We are examining AT&T's arguments and figures, and the arguments and figures of commenting parties. Regardless of the accuracy of any set of figures on AT&T's costs and revenues, NTIA and ICA have pointed to evidence of lower interest rates and inflation that, they claim, justify a rate of return lower than the one prescribed in 1981.

23. The legal framework for this discussion can be briefly stated. The Commission can prescribe a rate of return for a carrier's interstate services for purposes of determining whether the carrier's rates are just and reasonable.[13] To remain financially healthy, a carrier should target its rates to earn enough to cover its costs of operation and its financing expenses (cost of capital). The return to investors must "be commensurate with returns on investments in other enterprises having corresponding risks" and "be sufficient to assure confidence in the financial integrity of the enterprises, as to maintain its credit and to attract capital."[14] But, to protect the interests of ratepayers, the Commission should authorize "the lowest possible return consistent with overall responsibility to provide modern, efficient service at reasonable rates."[15] When economic conditions change, so should rate-of-return prescriptions in order to avoid unreasonable rates for ratepayers or hardship for the carrier and its investors.[16] The Commission does not have to employ a specific methodology in its rate-of-return prescriptions as long as the result falls within the "zone of reasonableness" and "upon consideration of the entire record,

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[13] 47 U.S.C. §§ 202, 205; Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975); United States v. FCC, 707 F.2d 610, 612 (D.C. Cir. 1983); AT&T: Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, *reconsid.*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982); AT&T: Equalization Filing, 89 FCC 2d 1000 (1982). The Commission may choose to enter an interim rate-of-return prescription. AT&T and the Bell System Operating Companies, 78 FCC 2d 661 (1980); AT&T: Charges for Interstate Telephone Service, 51 FCC 2d 619, 627 (1975).

[14] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). *See also* FPC v. Conway Corp., 426 U.S. 271, 278 (1976); FPC v. Memphis Light, Gas & Water Division, 411 U.S. 458, 466 (1973); Permian Basin Area Rate Cases, 390 U.S. 747, 791-92 (1968); United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103, 113-14 (1958).

[15] AT&T (Docket No. 19129), 38 FCC 2d 213, 226 (1972), *aff'd sub nom. Nader, supra.*

[16] "[W]e recognize as a general proposition that such a prescription cannot remain binding indefinitely without agency reevaluation, especially during periods of rapidly changing conditions." *Nader, supra,* 520 F.2d at 205. *See also United Gas, supra,* 358 U.S. at 113.

the agency's rationale reasonably may be perceived."[17] Pragmatic adjustments based on particular circumstances may lawfully be made to achieve a rate within the zone of reasonableness.[18]

24. We believe that the 12.75% authorized rate of return for the exchange carriers and AT&T should be reexamined. That rate of return may lead to unjust and unreasonable rates charged by these carriers. The *Further Reconsideration Order* stated (para. 29):

> We recognize that our 12.75% prescription may be outdated in view of the significant changes in economic conditions and changes in the structure of the telephone industry that have occurred since the spring of 1981 . . . . Exchange carriers and AT&T are facing rapidly changing economic circumstances, including, possibly, different interest rates, equity structures, pressures from competition and risk factors. We shall allow the overall 12.75 to stand while we develop data on these changed circumstances. In the meantime, AT&T and the exchange carriers may continue to file tariffs targeted to earn less than 12.75 percent, but not more than 12.75 percent.

The 1981 prescription pertained to a single firm (the pre-divestiture AT&T) that filed almost all interstate tariffs for the "partnership" services provided by the Bell System and independent telephone companies, and accounted for almost all interstate toll transmission plant and about eighty percent of the exchange plant of the "partnership." The AT&T divestiture and access charge rules adopted in Docket CC 78-72, Phase I require dissolution of the Bell System and the "partnership." We received 75 sets of interstate access service tariffs, including one from the ECA covering 1328 exchange carriers. In addition, AT&T filed new interstate tariffs in 1983, and several exchange carriers filed "copycat" tariffs for their interstate services other than exchange access. It appears that these carriers differ greatly in their financial structures and costs of financing. Even if it appeared that the average authorized rate of return should remain unchanged, the public interest would be served by examining whether some carriers should have higher or lower authorized interstate rates of return than others.

25. In addition, it appears that the average costs of financing for AT&T, the Bell Operating Companies, and the independent telephone companies may have shifted since the May 1981 rate-of-return prescription. Interest rates on a variety of financial instruments and the rate of inflation changed during this period.[19] According to reports filed with the Commission, AT&T and most exchange carriers earned on their interstate

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[17] *Permian Basin, supra,* 390 U.S. at 767; *Hope, supra,* 320 U.S. at 602; United States v. FCC, *supra,* 707 F.2d at 618; *Nader, supra,* 520 F.2d at 193; Aeronautical Radio v. FCC, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 920 (1981).

[18] *Permian Basin, supra,* 390 U.S. at 800; United States v. FCC, *supra,* 707 F.2d at 618.

[19] *See, e.g.,* Economic Report of the President 197, 283, 299 (1984); Standard & Poor's, Bond Guide 3 (March 1984); Moody's Investors Service, Moody's Public Utility 1977 (March 20, 1984); AT&T 1983 Annual Report, financial section at 5.

services 10.92% in 1981, 9.55% in 1982, and 10.10% in 1983—all substantially below 12.75%. Yet, we are not aware that any of these carriers was unable to attract capital at a cost consistent with these actual earnings during this period. Also, with the AT&T divestiture and the growth of competition, the riskiness of investing in many or all of these carriers currently may differ from the riskiness in May 1981. We cannot at this time state with confidence what our examination will reveal about a reasonable authorized rate of return for any one carrier or the average carrier currently. Close analysis is necessary to determine the relative costs of capital for these carriers currently as compared to May 1981. Yet, the public interest requires reexamination of authorized rates of return in the face of changing economic conditions. *Nader, supra,* 520 F.2d at 205.

26. In light of this information, we conclude that the changed industry structure and changing economic conditions warrant reexamining the 1981 rate-of-return prescription. Analysis of a carrier's rate of return is an integral part of an investigation of a carrier's rates and charges, and the Commission has the responsibility to determine what rate of return is just and reasonable. *Nader, supra,* 520 F.2d at 192. Of course, before reaching a new prescription, we will have to look closely at financial information and assess factors such as the effects of the AT&T divestiture on the riskiness of investments in AT&T and exchange carriers. We do not hereby vacate the 12.75% authorized rate of return for these carriers. Rather, we intend to institute a proceeding shortly to examine just and reasonable rates of return for AT&T and the exchange carriers. If the record in this proceeding shows that a new prescription is in the public interest, we shall prescribe a new rate or rates, and require AT&T and the exchange carriers to target their tariffs accordingly. We may choose to enter an interim prescription based on the available record and analysis before we complete this investigation, as we did in 1980 and 1975.[20] These carriers may choose to target their tariffs at less than 12.75% before we reach an interim or final prescription, as we stated in the *Further Reconsideration Order.*

27. *Other Access and Divestiture Related Tariffs.* Our order of October 19 in Docket CC 83-1145 also suspended AT&T's interstate tariffs and certain interstate tariffs of exchange carriers ("copycat tariffs") filed on or before October 3, 1983. AT&T's tariffs proposed substantial increases in private line rates, completely restructured private line services, modified rates and rate relationships for MTS, OutWATS, and 800 Service, and had other provisions which warranted investigation. We have decided to extend the suspension of AT&T's tariffs to June 1, 1984,

[20] *See* note 13 *supra.*

five months past their initial effective date.[21] 47 U.S.C. § 204(a). Our goal is to achieve generally reasonable and workable tariffs before they are allowed to take effect. Similarly, the copycat tariffs of the BOCs and certain other exchange carriers purportedly copied some of AT&T's existing tariffs as interim offerings, but contained changes and errors and raised other issues of lawfulness. Our analysis of the "copycat tariffs" is continuing and requires suspension of them to June 1, 1984.[22]

III. Ordering Clause

28. Pursuant to our authority under 47 U.S.C. §§ 154(i), 201(a), 203(b), 204, 205, and 211, IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[21] AT&T has not modified its proposed tariffs to take into account changes in the access tariffs resulting from the *Further Reconsideration Order* and the ECA and Non-ECA tariff orders. It is evident, moreover, that AT&T's rate proposals will be affected by the outcome of its Emergency Petition. Since some of the original rationale and justification for its October 3, 1983, filing has been impaired by subsequent events, we are continuing our suspension in the hope that resolution of lingering uncertainties will enable AT&T to finalize its changes and permit us to evaluate fully the results.

[22] Separate filings made to cancel existing tariffs concurrent with the effectiveness of the October 3, 1983, tariffs should be revised to reflect this suspension.

Educational Noncommercial Broadcast Service
Educational Television Service
Logs, Maintenance of
Program Logs for Educational Stations
Programming Considerations
Programming Requirements

Public radio and television stations deregulated; formal ascertainment requirements deleted and program logging requirements revised.
—*Public B/cing*
BC Docket No. 81-496

FCC 84-294

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees.	BC Docket No. 81-496

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 27, 1984; Released: August 22, 1984

BY THE COMMISSION:

Introduction

1. This proceeding began with the adoption of a *Notice of Proposed Rule Making* on July 30, 1981. 46 Fed. Reg. 55125, published November 6, 1981.[1] The *Notice* invited comments on deregulatory steps to remove unnecessary or outdated public broadcasting[2] programming and reporting requirements. Proposals were made in three areas: (1) *General*

[1] The proceeding also included a petition for rule making which had been filed by National Public Radio requesting deregulation of various aspects of public radio station operation.

[2] Although generally referred to as public broadcasting stations, these stations are classified in the Commission's rules as "noncommercial educational FM stations" or "noncommercial educational television stations." "Noncommercial" and "public" broadcasting are used interchangeably in this *Report and Order.*

Programming Responsibility, (2) *Ascertainment Requirements* and (3) *Program Logging Requirements.*

2. The proposals were set forth in the context of a series of Commission actions dealing with deregulation. In particular, the *Notice* referred to proceedings leading to the deregulation of commercial radio (BC Docket No. 79-219)[3] and to the proceeding in BC Docket No. 80-253 that led to a major simplification of the procedures to be followed when seeking renewal of a station's license.[4] In addition to these references, the *Notice* also discussed the history of public broadcasting and the evolution of the regulatory strictures applied to it.

The Nature of Public Broadcasting and Its Regulation

3. From its beginning as a primarily instructional service, public broadcasting has evolved into a much broader noncommercial service.[5] Most of the early stations were FM stations connected with educational institutions or school systems. For the most part, they were used as a vehicle for delivering instructional programming, and in many cases they were considered as a training ground for students who operated the station. While there were early exceptions, most of what we now consider as public broadcasting is a relatively new development. The broadened scope of expectations in regard to public broadcast stations and the service they provide were clearly set forth in the House Report 97-82 on H.R. 3238, the Public Broadcasting Amendments Act of 1981 (Public Law 97-35):

> [T]he existing Act clearly emphasizes the intent of Congress that diverse programming with sensitivity to the diverse needs, interests and concerns of our Nation's people, which may be underserved by commercial broadcasting, remain central to the unique service provided by Public Broadcasting. [At p. 11.]

4. Over the years the Commission has developed a body of law dealing with the programming obligations of broadcast licensees. The most definitive expression is found in the *1960 Policy Statement.*[6] While the

[3] *Deregulation of Radio,* 84 F.C.C. 2d 968, *recon. granted in part,* 87 F.C.C. 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. F.C.C.,* 707 F.2d 1413 (D.C. Cir. 1983) (Hereinafter, *UCC v FCC*).

[4] On March 26, 1981, the Commission adopted new and simplified procedures for license renewals which were applied to all broadcast stations, commercial and public, television and radio. 49 RR 2d 740, *recon. denied,* 50 RR 2d 704 (1981), *aff'd Black Citizens for a Fair Media v. F.C.C.,* 719 F.2d 407 (D.C. Cir. 1983).

[5] The history of public broadcasting can be traced as far back as 1934. Section 307(c) of the Communications Act of 1934 required the Commission to study the possibility of reserving facilities for noncommercial radio use.

[6] "The confines of the licensee's duty are set by the general standard of the public interest, convenience or necessity. . . . The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public

1960 Policy Statement accentuated the degree of Commission involvement in the programming area, formal ascertainment, as the term is now understood, was not a part of that process. An applicant for a new station or for renewal was required to be knowledgeable about its community of license and its environs. However, no particular method for obtaining this information was specified.

5. Gradually, the Commission formalized the ascertainment process. Thus, on February 18, 1971, the Commission adopted a *Primer* for new station applicants regarding the ascertainment of community problems and the presentation of programs to meet those problems.[7] Later, separate procedures were developed for renewal applicants. *See Renewal Primer,* 57 F.C.C. 2d 418 (1975), 41 Fed. Reg. 1372. Although these procedures were directly applicable only to commercial stations, the Commission had held that public stations also had a duty to ascertain community needs and to program to meet those needs. Ultimately, the Commission adopted specific procedures for public television and radio applicants and licensees. Public television stations were treated in a fashion similar to commercial stations, but somewhat less formalized ascertainment requirements were applied.

6. Public television stations had to observe four specific requirements designed to show that local needs had been properly ascertained and that programs to respond to those needs had been developed. The public television licensee was required to:

(1) Complete and place in its public file demographic data on its community of license;

(2) Conduct interviews with community leaders representative of all significant groups, following a checklist of leader categories;

(3) Conduct a general public survey, either using the traditional random sample method mandated for commercial stations, or by call-in programs or public meetings;

(4) Compile, place annually in the public file, and submit with each application a problems/programs list such as is required of public radio and commercial licensees.

7. Public radio licensees were allowed more flexibility. They were permitted to ascertain by any reasonable method that was designed to provide them with an understanding of the problems, needs and interests of their service areas. The process was to be documented by an annually prepared narrative report and problems/programs list. The narrative report detailed the sources consulted and the methods followed in conducting the ascertainment. It also summarized the principal needs and

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responsibility." *Report and Statement of Policy re: Commission en Banc Programming Inquiry (Policy Statement),* 44 F.C.C. 2303 at 2312 (1960).

[7] 27 F.C.C. 2d 650 (1971), 36 Fed. Reg. 4092 (March 3, 1971).

interests discovered. In addition, each year radio licensees were required to prepare a list of up to 10 problems ascertained in the past 12 months, together with examples of programs broadcast to meet those problems. The narrative statement and the problems/programs lists were to be placed in the station's public file. They also were to be submitted as part of the next application for license renewal. New applicants were required to file with the Commission a similar narrative report and problems list. However, the programs pertaining to the ascertained problems were listed prospectively rather than retrospectively. Class D FM stations were exempted from all formal ascertainment requirements.[8]

8. When these requirements were adopted, the Commission also adopted new forms with which to implement the changes. Several months later, the program logging rules were changed to bring the program categories specified therein in line with the program categories being used in the renewal form.[9] At that time public licensees were also required to make the logs available for public inspection and to submit them to the Commission upon request.[10]

The Notice of Proposed Rule Making

9. This proceeding was begun to explore the degree to which social and market forces could be relied upon to function as a substitute for governmental regulation of public stations. Another reason compels us to reexamine existing programming regulations governing public stations, particularly those receiving substantial funding through grants from the Corporation for Public Broadcasting and the National Telecommunications and Information Administration. Federal funding for these public broadcasting stations has been substantially reduced, and therefore the costs of meeting unnecessary regulatory burdens may have an adverse effect on the service these stations are able to provide.

10. With these points in mind, the Commission proposed a series of options ranging from ending the requirements entirely (or at least greatly reducing them) to retaining existing requirements. The options were:

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[8] Class D stations were given special treatment for two reasons. First, they have operated with only 10 watts transmitter output power and thus have had a highly restricted coverage area. In addition, they were often connected with schools or colleges, serving an audience concentrated there. Many were designed to play a special educational function at the school as a training ground for the students rather than being designed to provide a broader service to the public at large.

[9] *Amendment of the Commission's Rules and Regulations Concerning Program Logs for Noncommercial Educational Broadcast Stations*, 62 F.C.C. 2d 120 (1976).

[10] *Revision of Application for Renewal of License of Commercial AM, FM and Television Licensees*, 46 Fed. Reg. 26236 (May 11, 1981). Public broadcast stations now utilize the new "short form" renewal application and are subject to the long form audit requirement and to on-site inspection by the Commission's Mass Media Bureau.

General Program Responsibility

(1) Eliminate all Commission programming oversight not based on the "consideration received"[11] rules or specific statutory requirements.

(2) Retain a programming obligation broader than (1) above but rely on licensee good faith as much as possible as to the manner of responding to local needs.

(3) Retain current responsibility to respond to all significantly expressed community needs but permit some specialization.

(4) Retain current requirements in full.

Ascertainment

(1) Eliminate the ascertainment obligation and existing ascertainment procedures.

(2) Retain an ascertainment obligation but allow the use of any reasonable means to fulfill this obligation; no documentation would be required to be filed.

(3) Same as (2) above except that records would be maintained in the public file and/or submitted to the Commission.

(4) Retain the current requirements while eliminating the most costly or least cost effective parts.

(5) Retain the current requirements in full.

Program Logs

(1) Eliminate program logging requirements.

(2) Establish a limited logging obligation as a substitute for the present requirements.

(3) Retain the present logging requirements.

11. Comments and reply comments were received from a wide variety of parties, including licensees, associations, law firms, citizens groups and individuals.[12] The comments ranged from one page letters to voluminous filings examining the pertinent issues in great detail. A summary of these filings is contained in Appendix C.

Discussion

Programming

12. Although the *Notice* raised the matter of the general programming obligations of public licensees, no specific deregulation is indicated in this area in view of the absence of processing guidelines such as those that have been applied to commercial stations. Moreover, even option 1, the broadest proposal in the programming area, did little more than reflect our traditional reliance on public licensees' good faith discretion and judgment in discharging their programming obligation to address

[11] Sections 73.503 and 73.621 of the Commission's Rules then barred public radio and television stations, respectively, from receiving consideration for programs or announcements.

[12] Appendix B lists the parties filing comments and reply comments in this proceeding.

community issues.[13] We intended no departure from this successful and minimally intrusive regulatory approach. Accordingly, we do not believe it necessary to discuss in detail the various options raised in the *Notice.* We do believe, however, that a brief review of the special status of public broadcasting and the implications of this status in terms of programming responsibilities is appropriate.

13. Public broadcasting is explicitly encouraged by various Commission rules and policies. Perhaps most notable among these is our spectrum reservation policy whereby noncommercial stations are afforded protected frequency allocations for their exclusive use. Other state and federal governmental entities also accord public stations favored status by various means, including preferential tax treatment and considerable direct financial subsidies. Yet, public broadcast stations are also subject to specific limitations, such as restrictions on their use of commercial matter and advertising and the definitional requirement that they be non-profit, educational entities. Thus, the very definition of the service, the status of its operating stations, and its essentially non-profit, noncommercial programming nature make public broadcasting stations very different, in programming terms, from their commercial counterparts. With this in mind, we expect that as a practical matter the programming of these stations will reflect their special status and that they will provide their communities with significant alternative programming designed to satisfy the interests of the public not served by commercial broadcast stations. We would assume, for example, that in the rare case where the commercial media market appeared to ignore a significant issue in a community, the public stations would be among the first to address it, providing an important alternative and competitive spur to the other local media. Such responsive programming would be entirely consistent with the nature and historical performance of these stations.

14. Against this background, the Commission does not consider it necessary or appropriate to make any significant change in the programming obligation for noncommercial stations relied upon successfully in the past. Moreover, we believe that a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations. Further, we wish to note that the programming formats of these stations, as with many of their commercial counterparts, have become increasingly specialized, particularly in the case of radio, and that we expect this trend to continue. To the extent that this development increases the diversity of programming available to the

[13] As in *Alabama Educational Television Commission,* 50 F.C.C. 2d 461 (1975), Commission action may be taken if a station abuses its discretion and fails to meet its obligations.

public, we find it entirely consistent with our traditional programming policies. Meanwhile, of course, we expect that public broadcasters will continue to serve the significant programming needs of their communities. Consistent with this expectation, the Commission will retain the basic issue-oriented programming responsibility of public stations and require that these stations document compliance with this bedrock obligation by maintaining issues/programs lists as detailed in the logging section below.

Ascertainment

15. The comments establish that the current ascertainment requirements are burdensome and time consuming. Specifically, they note that ascertainment costs can reach over $13,000 and $6,000 per year for public television and radio stations, respectively, and can involve hundreds of yearly hours of staff time. The record in this proceeding contains no allegations or data to dispute the substantial nature of these costs. In fact, the impact of these costs has increased because public radio and television licensees have had to absorb major reductions in federal and other funding. Thus, it has become even more important to relieve these stations of unnecessary burdens. Indeed, Federal agencies are required by the Paperwork Reduction Act of 1980 to reduce such paperwork burdens wherever possible.[14]

16. We conclude that ascertainment requirements are unwarranted, particularly in view of the substantial costs they impose. We recognize the fact that public radio licensees are subject to somewhat less onerous ascertainment requirements than either commercial or noncommercial television licensees.[15] Nevertheless, our finding that ascertainment procedures are unnecessary in light of the special direct contact that public stations have with the public by virtue of their noncommercial status (see para. 18, *infra*), renders any costs incurred in ascertainment unnecessary and therefore overly burdensome. They unnecessarily place the emphasis on the methodology used to determine community needs rather than on the key issue of the station's responsiveness to these needs.[16] Instead of focusing on these formalistic requirements, we believe licensees should be afforded wide discretion to determine how community needs should be ascertained and met.

17. Moreover, as a general proposition, we believe that the Commission should regulate only where social and market forces are unlikely to ensure service in the public interest. The First Amendment makes it all

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[14] P.L. 96-511, 44 U.S.C. §3501, *et seq.*

[15] *See*, Paras. 6-7, *supra.*

[16] ". . .[A]scertainment was never meant to be an end in and of itself. Rather, it is merely a tool to be used as an aid in the provision of programming." *Radio Deregulation*, 84 F.C.C. 2d 968, 993 (1981).

the more important to rely on these forces as much as possible when program related regulation is at issue. Thus, for example, in the radio deregulation proceeding we concluded that the market forces affecting those broadcasters would operate to ensure operation in the public interest. In that case we were referring to a marketplace system that works in the conventional way, one in which businesses respond to public desires. Thus, if the public has an interest in a particular type of program, it makes economic sense for the commercial broadcaster to identify this interest and to present appropriately responsive programming and thereby gather a large audience for which to charge advertisers. Conversely, programming which does not interest the public will not attract the audience and hence will not interest the advertiser.

18. We believe that similar mechanisms are often even more extensive and reliable in the public broadcasting area. Like commercial broadcasters, public broadcasters face the necessity of obtaining funding to support their programming. As found by the congressionally created Temporary Commission on Alternative Financing for Public Telecommunications, public broadcasting stations obtain funding from a diverse mix of sources — including state and local government support, federal grants, corporate underwriting, and individual contributions. The Temporary Commission found that this pluralism among contributors to public broadcast programming "plays a key role in preserving the unique character of this service." *See* Temporary Commission on Alternative Financing for Public Telecommunications, Final Report to Congress, 4 - 5 (Oct. 1983). While individual public broadcast licensees differ in the degree to which they rely on the various revenue sources available to public broadcasting as a whole, no detailed consideration of the system's financial structure is necessary to recognize that all public stations have a substantial interest in presenting programming that will encourage continued and increased financial support by their varied sponsors.

19. Contributions from individual viewers are a very important source of public broadcast support.[17] In this respect the relationship between the audience and the local public broadcaster is even more direct than in the case of commercial broadcasting because public broadcasting's subscribers pay directly for programming that meets their needs and interests. Failure to discover and respond to audience needs and desires would lead inevitably to a reduction in such contributions. We believe that this essential economic relationship between the public licensee and its audience will ensure that public stations discover and serve local needs. Indeed, to the extent that audiences are unwilling to pay for programming

[17] Public broadcasting as a whole receives about one-sixth its revenue from individual subscribers. See Temporary Commission on Alternative Financing for Public Telecommunications, Final Report to Congress, Figure 1, at 5 (October 1983).

duplicative of that which they receive free from advertiser-supported television, this process will result in public stations adding to diversity by addressing needs unmet by commercial stations.

20. Public funding sources, such as the Corporation for Public Broadcasting (CPB) and state and local governments, also contribute positively to the program service offered by many noncommercial stations. These sources fund specific types of programs they wish to see increased. For instance, CPB has identified children's programming as its chief program objective in its 1983 and 1984 funding programs. Documentaries and special news programs also sometimes receive public funding. While not all noncommercial stations receive government program funding, these sources of funding add to the mix of programs available to noncommercial licensees.

21. Other factors also are likely to serve as a reliable substitute in the public broadcasting area. Here in particular, we belive that social forces are likely to serve as a reliable substitute for the Commission's ascertainment requirements. Many public broadcasters are required to have advisory boards and to hold public meetings when deciding important operating matters. Further, many other licensees such as WNET(TV) have public members on their governing boards. While it is true that stations licensed to state or local jurisdictions are not required to have advisory boards, these stations are often under even more direct public control since state and local officials are accountable for their action or inaction through the electoral process. Other stations licensed to organizations with a primary educational purpose are subject to the direction of these institutions and their governing boards. The station that ignores these representatives does so at its own peril.

22. Accordingly, in light of their not insubstantial costs, misplaced emphasis, doubtful necessity, and our judgment that the various social and market forces referred to above will combine to provide the necessary assurance that public stations will operate in the public interest, ascertainment obligations will no longer be applied to public stations.

Program Logs

23. As was the case with ascertainment, the comments show that logging requirements are costly and time consuming. In particular, they demonstrate that such costs easily can reach $20,000 yearly for a public television station and $10,000 per year for a public radio station. In addition, the comments establish that the staff of each public station spends hundreds of hours in order to meet the logging requirements. According to a General Accounting Office study, the total logging workload of public stations is more than five and a half million hours of

work per year.[18] Given the limited nature of our routine programming oversight responsibilities in connection with noncommercial licensees, we do not believe that these substantial costs are justified.

24. In addition, we note that comprehensive program logs for public radio and television stations do not provide definitive information needed by the Commission to determine whether a public radio or television station has operated in the public interest. Program logs provide statistics on the amount of programming that has been presented in the various program categories. However, these program percentages have not been used by the Commission to determine what action should be taken on the applications filed by public radio and television stations. In this respect, public station applications were treated differently from commercial radio and television applications. In the latter case, program percentages have been used to determine if applications could be granted by Commission staff action pursuant to delegated authority.[19] In addition, the program percentage figures for public broadcast stations were never used for "promise v. performance" purposes as they had been for commercial stations.

25. We have considered the appropriate nature and scope of the program logging obligation for commercial broadcasters in the wake of deregulation and the reduced routine Commission oversight of programming which it entailed. We believe that our analysis of the program logging issue in these proceedings is directly applicable to the question presented here and that we can obtain important guidance in defining that obligation as it applies to noncommercial broadcasting.

26. As stated in the *Second Report and Order* in Radio Deregulation,[20] the logging obligation of commercial radio broadcast licensees now consists of a requirement that they prepare and make available in their public inspection files a quarterly issues/programs list. The list must contain, in narrative form, a brief description of at least 5 to 10 issues which the licensee addressed with responsive programming during the preceding three months, along with a statement of how each issue was treated.[21]

27. In our view, this issues/programs list requirement will provide the information necessary for our regulatory oversight of public broadcasting

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[18] *See* Appendix C.

[19] The radio deregulation proceeding deleted these delegation guidelines for commercial radio applications.

[20] 55 RR 2d 1401 (1984). The original statement of the program logging obligation for radio licensees adopted in the initial order in radio deregulation was remanded by court to the Commission for further consideration. *UCC v. FCC, supra* n. 3. The *Second Report and Order* amended the obligation in response to the remand order.

[21] Action taken today applies an essentially similar requirement to commercial television licensees.

as well as adequate data to permit the public, potential petitioners to deny and competing applicants to review and evaluate public broadcasters' performance. At the same time, the significant reduction in the costs of compliance for public licensees which this approach permits will enable these entities, already faced with decreasing federal support, to use their resources in a more cost effective manner. Furthermore, the highlighted issues/programs list will be easier for the public to review than the voluminous raw logs stations must currently maintain.

28. In addition, we no longer will subject public broadcasting stations to the long form audit, Form 303-N. This procedure which originated in the short form renewal proceeding, was applied to commercial television and to public radio and television stations. It was not applied to commercial radio because it was seen as inconsistent with the deregulation that had taken place.[22] Now that we have deregulated public licensees as well, this procedure will no longer be utilized in this area either. We emphasize, however, that elimination of the long form audit does not alter the substantive obligation of licensees to serve the public interest. We note as well that the Commission will continue to conduct random FOB technical inspections and to check the public inspection files of noncommercial licensees for completeness.

29. While program logging requirements are being eliminated, a licensee is still required to keep records of political candidate appearances or "uses" [see Section 73.1810(f)(l)(v) and 73.1810(f)(4)(ii) of the Commission's Rules] and a notation that it has performed the required Emergency Broadcast System tests.[23]

30. Regulatory Flexibility Analysis

I. Need for and Purpose of the Rule

The Commission has concluded that present ascertainment requirements imposed on public radio and television stations can be removed and that program log keeping requirements should be less burdensome. This relaxation in current requirements is based on the conclusion that social and marketplace forces can be relied on to insure operation in the public interest.

[22] 46 Fed. Reg. 26236, 26240-1.

[23] Stations also will be required to continue to:

(1) provide donor identification announcements in accordance with Section 73.1212;

(2) make station identification announcements as required by Section 73.1201;

(3) make required local notice announcements under Sections 73.3580 and 73.3594; and

(4) announce that material in a program was taped, filmed or recorded (where required by Section 73.1208).

II. Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues Raised

(1) Many of the parties favored deregulation in the two areas under consideration: ascertainment and log keeping.

(2) Several parties opposed all of these changes, arguing that these forms of regulatory oversight were needed to insure licensee accountability.

(3) Several filings took a middle position in favor of substantial deregulation along with retention of certain of the old requirements.

B. Assessment

The Commission concluded that deregulation in this area could provide important benefits to public and stations alike. In addition, it could aid these stations in enhancing their ability to raise needed funds and cut excessive costs.

C. Changes Made as a Result

(1) The Commission did not find the arguments in opposition to deregulation to be persuasive. The old requirements were generally found to be burdensome and, for the most, part unnecessary. We now eliminate our ascertainment requirements and relax our program log requirements.

(2) While concluding that social and marketplace forces could be relied on as a substitute for regulation in most instances, the Commission did find it necessary to retain a generalized program obligation and some reporting requirements.

III. Significant Alternatives Considered and Rejected

No suggestions were offered beyond the range of options raised in the *Notice*. Our reasons for the choices made are described above.

31. Accordingly, IT IS ORDERED, That the Commission's Rules ARE AMENDED, effective September 25, 1984, as set forth in the attached Appendix A.

32. IT IS FURTHER ORDERED, That FCC Form 303-N is eliminated.[24]

33. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE a copy of this Report and Order to be printed in the FCC Reports.

34. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[24] By separate action today we are amending FCC Forms 302, 340, and 341 and have therein incorporated the appropriate changes dictated by our decision in this proceeding.

35. This action is taken pursuant to the authority contained in Sections 4(i), 303(a), 303(b), 303(g), 303(j), 303(r) and 317(e).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

1. 47 CFR 73.295 is amended by revising paragraph (d) to read as follows: §73.295 Use of multiplex subcarriers.

* * * * *

(d) The station identification, delayed recording and sponsor identification announcements required by §§73.1201, 73.1208, and 73.1212 are not applicable to material transmitted under an SCA.

2. 47 CFR 73.1210, TV/FM dual-language broadcasting in Puerto Rico, is amended by removing subparagraph (b)(4) and marking it [Reserved].

3. 47 CFR 73.1212, Sponsorship identification; list retention; related requirements, is amended by removing subparagraph (g)(2) and marking it [Reserved]

4. 47 CFR 73.1225 Station inspections by FCC, is amended by removing subparagraphs (d)(2) and (d)(2)(i).

5. 47 CFR 73.1800 is amended by revising the Section title and paragraphs (a) (c) and (g) to read as follows, and by removing paragraph (f) and marking it [Reserved]:

§73.1800 General requirements related to the station log.

(a) The licensee of each station must maintain a station log as required by §73.1820. This log shall be kept by station employees competent to do so, having actual knowledge of the facts required. All entries, whether required or not by the provisions of this Part, must accurately reflect the station operation. Any employee making a log entry shall sign the log, thereby attesting to the fact that the entry, or any correction or addition made thereto, is an accurate representation of what transpired.

* * * * *

(c) Any necessary corrections of a manually kept log after it has been signed in accordance with paragraph (a) of this Section shall be made only by striking out the erroneous portion and making a corrective explanation on the log or attachment to it. Such corrections shall be dated and signed by the person who kept the log or the station chief operator, the station manager or an officer of the licensee.

* * * * *

(f) [Reserved]

(g) Application forms for licenses and other authorizations may require that certain technical operating data be supplied. These application forms should be kept in mind in connection with the maintenance of the station log.

6. 47 CFR 73.1810, Program logs, is removed in its entirety.

7. 47 CFR 73.1840 is amended by revising subparagraph (b)(1) to read as follows:

* * * * *

(b) * * *

(1) Suitable viewing - reading devices shall be available to permit FCC inspection of logs pursuant to §73.1226, Availability to FCC of station logs and records.

* * * * *

8. 47 CFR 73.1850, Public Inspection of Program Logs, is removed in its entirety.

9. 47 CFR 73.3527 is amended by removing paragraphs (b) and (c) and such subparagraphs and subdivisions which are a part thereof and marking them [Reserved]; and by revising subparagraphs (a)(7), (a)(8) and paragraph (g) to read as follows:

§73.3527 Local Public Inspection file of noncommercial educational stations.

(a) * * *

* * * * *

(7) For noncommercial broadcast stations every three months a list of at least 5 to 10 community issues addressed by the station's programming during the preceding 3 month period. The list is to be filed by the tenth day of each calendar quarter (*e.g.*, July 10, October 10, January 10 and April 10) and should include a record of programming for the 3 preceding calendar months (*e.g.*, the list filed by July 10 would be a record of programming from April 1 through June 30). The list shall include a brief narrative describing how each issue was treated. The description of the program should include, but is not limited to, the time, date and duration of each program, the title, and the type of programming in which the issue was treated, (e.g. public service announcements, a call-in program with a public official, etc.). These lists are to be retained for the entire license period.

Note: The first quarterly filing is to include at least the past three months of a station's programming performance. If the last annual issues/programs list was filed more than three months prior to October 1, 1984, the licensee must place in its public inspection file an issues/programs list encompassing the period of time between its last annual filing and October 1, 1984.

(8) The lists of donors supporting specific programs.

* * * * *

(b) [Reserved]

(c) [Reserved]

* * * * *

(g) *Period of retention.* The records specified in paragraph (a)(4) of this Section shall be retained for the periods specified in §73.1940 (two years). The manual specified in paragraph (a)(6) of this Section shall be retained indefinitely. The donor lists specified in paragraph (a)(8) of this Section shall be retained for two years. The contracts specified in paragraph (a)(9) shall be retained for the life of the contract(s) between the parties to the contract(s). The records specified in paragraphs (a)(1), (2), (3), and (5) of this Section must be retained as follows:

* * * * *

10. 47 CFR 73.3580 is amended by revising the pre-filing announcements found in subdivision (d)(4)(i) and the post-filing announcements found in subdivision (d)(4)(ii) to read as follows:

§73.3580 Local public notice of filing broadcast applications.

* * * * *

(d) * * *

* * * * *

(4) * * *

(i) *Pre-filing announcements.* During the period and beginning on the first day of the sixth calendar month prior to the expiration of the license, and continuing to the date on which the application is filed, the following announcement shall be broadcast on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

On (date of last renewal grant) (Station's call letters) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (expiration date).

Our license will expire on (date). We must file an application for renewal with the FCC (date four calendar months prior to expiration date). When filed, a copy of this application will be available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (period of time covered by the application).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (date first day of last full calendar month prior to the month of expiration).

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained from the FCC, Washington, D.C. 20554.

* * * * *

(ii) *Post filing announcements.* During the period beginning on the date on which the renewal application is filed to the sixteenth day of the next to last full calendar month prior to the expiration of the license, all applications for renewal of broadcast station licenses shall broadcast the following announcement on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

On (date of last renewal grant)(Station's call letters) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (expiration date).

Our license will expire on (date). We have filed an application for renewal with the FCC.

A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (period of time covered by application).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (date first day of last full calendar month prior to the month of expiration).

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained from the FCC, Washington, D.C. 20554.

* * * * *

9. 47 CFR 73.4020, Ascertainment (and annual list of problems and needs), is removed in its entirety.

10. 47 CFR 73.4021, Ascertainment evaluations by FCC, is removed in its entirety.

11. 47 CFR 73.4025, Ascertainment, noncommercial educational stations, is removed in its entirety.

Common Carrier, Authorizations
Competitive Practices
Satellite Communications

Petition to modify conditions of authorization granted subject to conditions. Commission removed marketing restrictions imposed on Satellite Business Systems and IBM, one of its parent companies. Reasons for imposing restrictions are no longer applicable given the growth of domestic satellite industry and inability for IBM to impair competition in telecommunications market.
—*Satellite Business Systems*

FCC 84-197

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Satellite Business Systems	ENF-83-16
Petition to Modify Conditions of Authorization	

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1984; Released: June 8, 1984

BY THE COMMISSION:

1. Before us is a petition filed by Satellite Business Systems (SBS) in which it requests removal of the marketing restrictions the Commission imposed on SBS in 1977 as a condition for approval of its license to operate.[1] SBS is owned by subsidiaries of International Business Machines (IBM), Communications Satellite Company (Comsat) and Aetna Casualty and Surety Company (Aetna). The company offers, *inter alia*, domestic and international voice and data services via satellite. The restrictions were imposed because of the Commission's concern that IBM, due to its considerable resources and market share in the data processing industry, might engage in anticompetitive behavior which could adversely affect the then-emerging domestic satellite communications industry. Due

[1] CML, 51 FCC 2d 14 (1975); SBS, 62 FCC 2d 977 (1977), *recon. denied*, 64 FCC 2d 872 (1977), *aff'd sub nom.* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

to these concerns, the Commission placed the following restrictions on SBS and IBM.

1) IBM is prohibited from selling or promoting SBS' products.

2) SBS is prohibited from selling or promoting IBM's products.

3) IBM and SBS are precluded from giving joint marketing presentations.

SBS now seeks to have these restrictions removed because it believes the domestic satellite communications industry is competitive and IBM possesses no market power in the electronic data processing (EDP) market.

2. Oppositions to SBS' petition were filed by Continental Telecom, Inc. (Contel), American Satellite Company (AmSat)[2] and the Western Union Telegraph Company (Western Union), SBS filed a reply.[3] Thereafter, the Chief, Common Carrier Bureau, directed several questions to SBS in order to provide a more adequate record upon which the Commission could base its decision.[4] The Bureau determined that SBS' response to the questions were not complete for purposes of this proceeding and therefore sent a follow-up letter to SBS.[5] In particular the Bureau sought further information from SBS regarding IBM's market power. Both letters elicited a round of responses by the opposing parties and replies by SBS.[6] As discussed herein, we agree with SBS that continuation of the marketing restrictions is not in the public interest. Accordingly, we grant the petition.

Background

3. SBS has undergone several changes in structure and ownership. Initially Comsat, MCI Communications, Inc. (MCI) and Lockheed Aircraft Corporation formed the CML Satellite Corporation for the purpose of offering domestic satellite services. Before the system became operative, MCI and Lockheed indicated they were no longer willing to contribute to the financing of CML. Consequently, CML, Comsat and IBM petitioned the Commission for approval of changes in CML's corporate structure whereby Comsat would acquire a 45% and IBM a 55% ownership share of

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[2] AmSat is jointly owned by Contel and Fairchild Industries. *See* ASC, 80 FCC 2d 254 (1980).

[3] SBS filed a Motion for Late Acceptance with its Reply. While we do not encourage late pleadings, in the interest of maintaining a complete record, we accept SBS' reply. Western Union then filed a Motion for Leave to File Accompanying Response and a Response. SBS opposed the Motion. We deny Western Union's motion as an unauthorized pleading and do not consider it in this proceeding. *See* Section 1.45(c) of the Rules.

[4] Letter to the Assistant General Counsel, SBS, from the Chief, Common Carrier Bureau, August 10, 1983.

[5] Letter to the Assistant General Counsel, SBS, from the Chief, Common Carrier Bureau, November 3, 1983.

[6] A list of all the pleadings filed in this proceeding appears in the Appendix.

CML.[7] While the Commission determined that both IBM and Comsat were qualified applicants, it rejected their application. The Commission, as well as the numerous opposing parties, were concerned about the possible anticompetitive impact of IBM's entry and participation on the then-emerging domestic satellite industry. *CML*, 51 FCC 2d at 27. In particular, we were concerned that IBM might offer a bundled, end-to-end package of its data processing equipment and SBS' communications services. A bundled or systems approach is the offering of a total system package of products and services for a single price such that the customer or user is never aware of the actual price of the components of the package. *Id.* at 27-8.[8] The opposing parties argued that IBM had the capability of offering data processing equipment and services that were only compatible with SBS communications services and equipment, or IBM could have designed SBS' offerings to be compatible only with IBM equipment and services. They maintained that no other entrant had similar capabilities or such ready access to as large a business customer base as IBM. According to the opposing parties, there was the added possibility that IBM might offer discounts or extend preferential treatment to induce customers into taking a bundled system. Were IBM to engage in the conduct described above, the Commission believed SBS would gain an extraordinary advantage and headstart over all other potential entrants during the early stages of the development of domestic satellite communications. This would clearly be in conflict with the Commission's domestic satellite policy of encouraging competition through open entry. *Id.* at 33. Furthermore, there was some doubt by the Commission that IBM and Comsat would compete effectively with AT&T given the broad range of AT&T's dealings with IBM and Comsat.

4. In short, while the Commission was in favor of IBM's and Comsat's participation in the new domestic satellite entity, it also wanted to promote effective competition and limit the potential for IBM to engage in anticompetitive conduct. Therefore, it offered the applicants three alternative corporate structures. IBM and Comsat chose the so-called "balanced CML" option whereby they were required to find a third partner for the venture to "balance" IBM's and Comsat's influence. *Id.* at 41. In addition, the Commission determined that IBM and the new satellite entity would be precluded from selling or promoting each other's products. While our aim was to restrain IBM from gaining control over the new entity, we

[7] Commission approval of such corporate changes was required pursuant to Memorandum Opinion and Order, Docket No. 16495, 38 FCC 2d 665, 684 (1972).

[8] Another characteristic of a bundled arrangement is that a customer is required to take one product, here SBS' services, in order to obtain another, desired product, *i.e.* an IBM computer. This is also referred to as a tying arrangement. *See also* AT&T: Private Line Rate Structure and Volume Discount Practices, 74 FCC 2d 226, 245 (1979).

remained cognizant of the fact that our jurisdiction over IBM was limited to a showing of relevance to our concerns under the Communications Act. However, to the extent that IBM's activities might affect our domestic satellite policy, we would exercise limited jurisdiction. *Id.* at 27.

5. Aetna agreed to participate in the new satellite venture, to be called Satellite Business Systems, with Comsat and IBM. Each partner has a one-third interest in SBS. *SBS*, 62 FCC 2d 997 (1977). In its application, SBS clearly stated that it would not provide a "bundled" or packaged offering of communications and data processing services, and that it would comply with the conditions we established in the *CML* decision. *Id.* at 1020.[9] Moreover, SBS and IBM maintained that IBM would not offer a discount or other preference to IBM customers who also subscribe the SBS, and that SBS similarly would not offer a preference to IBM's customers. SBS also stated that, due to the interdependence of data processing equipment and communications services, SBS and IBM planned to give joint marketing presentations to potential customers.

6. The Commission found IBM and SBS had complied with the marketing restrictions set forth in *CML, supra.* However, we rejected their plan to make joint marketing presentations because of the potential anticompetitive abuses which might flow from such activities. Therefore, we added an additional restriction against such joint presentations as a condition of our grant of SBS' application. In so doing, we reiterated that our reason for imposing conditions on the new venture was " . . . to ensure that such communications entity would compete with other domestic satellite carriers on even terms, and would not obtain an unfair advantage through IBM's influence in the data and computer equipment field." *SBS*, 62 FCC 2d at 1048. Finally, to allay our concerns about technical tailoring of SBS' channels to IBM equipment, we required SBS' offerings to be "transparent" to the type of computer using the transmission service, and we required SBS to provide reasonable interconnections to all other equipment and service suppliers.

The Pleadings

7. In its petition, SBS argues that the Commission's reasons for imposing the marketing restrictions, i.e., to prevent SBS from gaining an undue advantage and headstart over its competitors during the infancy of the domestic satellite communications industry due to IBM's power in the data processing market, can no longer be justified due to changes in marketplace conditions since 1977. SBS maintains that the domestic satellite industry is no longer in its infancy, that the industry is competitive, and that Commission policy no longer supports impediments

[9] A major consideration affecting SBS's decision to comply with our conditions was its interest in avoiding the alternative — a lengthy evidentiary hearing on its application.

to full competition and efficient marketing. SBS states that, unlike its competitors, it began to offer service only in 1981 and continues to operate at a loss.[10] SBS maintains it did not have a "headstart" over its competitors nor did it enjoy any undue advantages during the developmental stages of the industry. In addition, SBS contends that it is the only participant encumbered by the subject marketing restrictions. According to SBS, the restrictions are " . . . wholly unnecessary and contrary to the public interest." *Petition*. p. 20. It stresses that eliminating the marketing restrictions would not affect SBS' commitment to non-discriminatory interconnection policies and it will continue its practice of publishing interface specifications with the Commission.

8. Oppositions to SBS' petition were filed by Contel, AmSat and Western Union. While Contel concedes that conditions in the domestic, interstate telecommunications market have changed since 1977, it maintains these changes do not entirely eradicate the concerns which prompted the Commission to impose the restrictions. Specifically, Contel disagrees with SBS' characterization that the restrictions were imposed primarily to prevent the new satellite entity from gaining a headstart during the early stages of the development of the domestic satellite industry. Instead, Contel maintains, the Commission was more concerned about IBM's market power. Contel argues that IBM is still the dominant worldwide supplier of data processing equipment and services and has a substantial and entrenched customer base which would give SBS an extraordinary advantage over other carriers were the restrictions lifted. Therefore, the fact that some of SBS' data communications competitors have expanded their operations since 1977 does not entirely eliminate the opportunity for IBM and SBS to dominate a large share of the market, according to Contel. Western Union's and AmSat's arguments against lifting the restrictions are essentially the same as Contel's.

9. The other major argument made by Contel is that SBS has not shown either that consumers or SBS is harmed by the marketing restrictions. Contel maintains that despite the restrictions consumers are free to obtain information and/or services from IBM or any other data processing vendor they choose. In addition, Contel argues that SBS has been able to expand its operations, obtain new customers, and increase its revenues, all within the confines of the marketing restrictions. In response to these arguments, SBS states that, for example, it cannot meet with IBM to design a system for a potential mutual customer, redesign a

[10] In a recent letter to the Commission concerning another matter, SBS states that "[a]fter eight years of substantial capital investment SBS has yet to become profitable, incurring very substantial losses in each of its three initial operating years, 1981, 1982 and 1983." *See* Letter from the Senior Vice President, Legal and Government Affairs, SBS to the Chief, Common Carrier Bureau, January 23, 1984.

system for an existing mutual customer or discuss in any way problems associated with an offering of a combination of SBS and IBM products.

10. In its August 10, 1983 letter requesting further information from SBS, the Bureau agreed with the opposing parties that one of the major reasons the conditions were imposed was "to prevent IBM from using its position in the computer industry as a lever to gain control of the satellite communications field. . . ." *United States v. FCC*, 652 F.2d 72, 102 (1980). SBS did not address this concern either in its petition or its response to question 1 of the Bureau's letter of August 10, 1983.[11] Therefore, on November 3, 1983, the Bureau again asked SBS to address this issue. SBS was asked " . . . to provide specific factual information regarding whether IBM possesses the ability to use sales of computers to impair competition in telecommunications services." As seen from the following discussion, SBS' response of January 20, 1984 addresses this concern.

11. SBS explains in its response to the Bureau's November letter that while it has no expertise to evaluate the data processing equipment market, it does " . . . provide information concerning both IBM's position in the electronic data processing market and the effects of that position *vis-a-vis* SBS." *Response*, p. 1. As SBS sees it, the key issue is whether the restrictions are necessary to prevent IBM and SBS from engaging in practices which might impair competition in the interexchange, domestic, interstate telecommunications market.

12. With its response, SBS filed a copy of testimony submitted by Dr. James W. McKie, an expert witness for IBM who testified in the antitrust suit filed by the Department of Justice. *U.S. v. IBM*, 69 Civil 200 (S.D.N.Y. filed January 17, 1969; dismissed January 8, 1982). Dr. McKie concluded in 1980 that " . . . IBM does not possess market power." According to Dr. McKie's testimony, IBM's share of the electronic data processing (EDP) market, which he views as the relevant market, declined steadily from 1972 to 1979.[12]

13. SBS then states that even if IBM had market power, it could not be used to impair competition in the market in which SBS competes. SBS defines that market as encompassing "interstate, domestic, interexchange telecommunications services." *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities and Authorization Therefor*, 48 Fed. Reg. 52452, 52456 (November 18, 1983) (Fourth Report). SBS claims it has only a small share of the domestic satellite communications

[11] SBS filed a Motion for Acceptance of Response to these comments "out of an abundance of caution" as our August 10, 1983 letter had not specified that SBS could file a reply. Section 1.45(b) of the Rules provides for the filing of reply comments by a petitioner. While SBS' motion was unnecessary, we nonetheless grant it.

[12] Dr. McKie states in the introduction to his testimony that it was prepared in 1980 but there is no indication as to the date the testimony was presented.

business, itself a small portion of the interstate telecommunications market. In turn, IBM supplies EDP equipment and supplies to only a few customers of interstate telecommunications services. Thus, SBS concludes that even if all of IBM's customers were also SBS customers, this would not foreclose a significant portion of the market to SBS' competitors. Finally, SBS represents that if the restrictions are removed, it and IBM will continue to follow marketing practices which will permit both actual and potential customers to choose freely among competing EDP and communications suppliers.[13]

14. In response, Amsat, Contel and Western Union maintain that the filing was no more responsive to the Bureau's information request than SBS' previous submissions. In particular, they criticize SBS' reliance on Dr. McKie's testimony. Western Union argues that if the Commission considers his testimony, then it should also consider both the government's cross-examination of him and the testimony of other government witnesses. AmSat and Western Union, in an effort to rebutt Dr. McKie's testimony, provide copies of various magazine and law review articles whose authors believe IBM, to some extent, has power in the EDP market.

15. Three other issues were raised by the opposing parties. They argue that the self-imposed marketing limitations offered by IBM and SBS are insufficient to protect the public from anticompetitive behavior by IBM and/or SBS. Further, AmSat argues that the relevant market for the purposes of this proceeding is domestic satellite communications and not, as SBS maintains, interstate, domestic, interexchange telecommunications. Finally, Contel asks that we conduct a full evidentiary hearing and investigation into SBS' claims concerning IBM's market power.

16. SBS countered these arguments by first asserting that it supplied the best information it could and that it would be impractical to suggest that the entire issue of IBM's market power be relitigated after the Department of Justice dropped its suit against IBM. Moreover, SBS rejects the opposing parties' claims that IBM possesses market power and states that these parties offer only unsupported statements and unpersuasive articles to make their claims. SBS also points out that none of the three commenters discusses how IBM might exercise its alleged market power to SBS' benefit. It maintains that the real issue here is what affect removal of the marketing conditions would have on the relevant market which, contrary to AmSat's claim, is interstate, domestic, interexchange telecommunications. In addition, SBS argues that an evidentiary hearing and investigation is unnecessary here. Finally, SBS points out that the parties need not rely solely on its and IBM's self-imposed marketing limitations to protect them from anticompetitive conduct by IBM and SBS

[13] These commitments are listed in para. 25, *infra.*

as remedies are available under the Communications Act and antitrust laws.

Discussion

17. A major goal in imposing the restrictions on SBS and IBM was to foster competition in the emerging domestic satellite field. We were cognizant of the fact that while the industry was then "embryonic and largely experimental," unforeseeable changes might occur in the future which would alter the competitive nature of the industry. *SBS*, 62 FCC 2d at 1088. In fact, our early satellite policy was designed to be flexible to accommodate a changing field. *Orbit Deployment Plan*, 84 FCC 2d 584, 602 (1981). We have already made several significant adjustments to our regulation, e.g. permitting certain sales of transponders, *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), and classifying domestic satellite carriers as non-dominant. *Fourth Report, supra*. We believe it is time to remove the marketing restrictions on SBS and IBM as currently an unnecessary regulatory burden that inhibits the efficient distribution of products and services.

18. During the early 1970's, domestic satellite communications was just emerging. At that time, we were uncertain of the demand and competition for domsat services. The technology was new and largely untested. Enormous amounts of time and money were needed to establish these systems. In essence, the Commission was dealing with an unknown quantity which it perceived as having great potential for offering new services and opening new markets. To encourage development, the Commission established a policy of encouraging open entry into the field and of minimizing regulatory restraints on it. *See SBS*, 62 FCC 2d at 1032-33. It was against this background that the Commission imposed the subject restrictions on SBS and IBM.

19. By the late 1970's, the Commission was faced with rapidly growing demand for domestic satellite services. This made entry into the field an attractive opportunity for firms such as Hughes Communications Company and Southern Pacific Communications. It became necessary to process a large number of applications as quickly as possible and thus the Commission streamlined the application procedure. *Processing of Pending Space Station Applications in the Domestic Fixed Satellite Service*, 77 FCC 2d 956 (1980). By the next year, the Commission again altered its procedures in response to "... an urgent need to authorize without protracted administrative delay." *Orbit Deployment Plan*, 84 FCC 2d at 592. We decided to grant launch authorizations and orbital assignments concurrently with construction authorizations in order to process applications quickly. We also devised a tentative orbital deployment plan which maximized the available orbital locations. Finally, we authorized the construction of 25 new domestic satellites and the launch of 20 new or

previously constructed satellites. *Id.* at 585 and Appendix A. Soon thereafter, the Commission made even more orbital space available by reducing the spacing between satellites in the 4/6 GHz band. *Notice of Inquiry and Notice of Proposed Rulemaking Licensing of Space Stations in the Domestic Fixed Satellite Service and Related Revisions of Part 25 of the Rules and Regulations*, 88 FCC 2d 318, 319 (1981); *Report and Order*, FCC 83-184, released August 16, 1983. Moreover, when demand for transponders increased, we permitted satellite licensees to sell transponders on a contract rather than tariff basis. *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

20. In recognition of the competition facing domestic satellite carriers, the Commission recently declared domestic satellite carriers "non-dominant" and reduced the regulatory burdens on them. *Fourth Report, supra* at para. 16. The Commission determined that domestic satellite services do not comprise a distinct product market or submarket. We also found that no domestic satellite carrier possesses market power. Satellite services are substitutable with terrestrial services, a tactor which serves as a check on charges for satellite services. The Commission also noted that the supply of satellite services is increasing through the expansion of existing systems and new entrants. *Id.* at paras. 20-21.

21. The Commission's continued flexibility towards its domestic satellite policy has resulted in additional entrants, new and innovative services, and more efficient use of available technology. The growth of the industry is evident from the figures in Table 1, showing a steady rise in the number of entrants and increased amounts of satellites and transponders projected for the near future. In 1977, when the restrictions were imposed on SBS, three carriers, RCA Americom, Western Union and AT&T, had a total of 6 satellites with 120 transponders. Presently, there are five entities owning a total of 18 satellites with 372 transponders.[14] There is no doubt that the industry has passed its early developmental stage. As indicated above, the Commission has been most flexible in fashioning its regulation of domestic satellites to protect the public interest as the industry matured. "There has been a relaxation of artificial restraints in the domestic arena in favor of multiple entry and enhanced freedom of competition." *Comsat*, 80 FCC 2d 170, 179 (1980).

22. As indicated in paragraph 9, *supra* Contel claims that SBS does not demonstrate how its operations have been hampered by the restrictions. In view of the vast growth of the domestic satellite industry, SBS should not be hindered by restrictions imposed when the industry was in its formative stage. Moreover, we believe that the public might benefit from lifting the restrictions. SBS would have more flexibility to meet consumer needs, and be able to lower its marketing costs and compete

[14] These figures are on file with the Commission's Common Carrier Bureau.

more effectively with other carriers. Currently, it is possible for other carriers, such as Western Union and Amsat, to design a system with IBM while SBS is precluded from doing so because of the restrictions. Absent the restrictions, SBS would be able to compete with any carrier which chose to design a system incorporating its common carrier offerings for customers utilizing IBM products. The possible benefits to consumers and intensification of competition favor removing these marketing restrictions. However, we emphasize that removing the restrictions should not be construed to mean that SBS may design systems just for IBM customers. SBS, as a common carrier, remains obligated to make general common carrier offerings which must be available to all interested customers.

23. The preceeding discussion shows clearly that the domestic satellite industry is now firmly established and we need no longer be concerned that SBS might have an unfair advantage over other new entrants. We now turn to the remaining issue: whether IBM possesses sufficient market power in the EDP market so as to impair competition in the telecommunications market. None of the parties provides concrete information "regarding whether IBM possesses the ability to use sales of computers to impair competition in telecommunications services," as we requested in our letter of November 3, 1983 addressed to SBS.

24. SBS notes that IBM was the defendant in several antitrust suits over the past ten years in which the courts found IBM lacked monopoly power and that its actions did not constitute unreasonable restraints on competition. "There was also considerable evidence that regardless of IBM's market shares, it lacked the power to control prices or exclude competition in these markets. Both competitors and customers of IBM in the computer industry stated that the industry is extremely competitive." *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423, 431 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp. v. International Business Machines Corp.*, 636 F. 2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). A year later, another court found:

> This market was not monopolized. IBM did not control prices, it reacted to the prices set by others. IBM's market share . . . was below 57% and falling. Entry was easy for anyone with a good idea and the courage to exploit it, and new entrants, along with the old, grew and prospered.

In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965, 982 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Transamerica Computer Co. v. International Business Machines Corp.*, 698 F. 2d 1377 (9th Cir. 1983), *cert. denied.* 52 U.S.L.W. 3343 (1983). *See also Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 898-99, 912-19, (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *California*

Computer Products Inc. v. International Business Machines, 613 F.2d 727 (9th Cir. 1979); *cf. Greyhound Computer Corp. v. International Business Machines*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). AmSat, Contel, and Western Union did not comment on these decisions.

25. As an added measure of protection against possible anticompetitive conduct by IBM and SBS after the restrictions are lifted, the companies have voluntarily agreed to abide by the following marketing practices. IBM will:

1. Market EDP equipment and software that is compatible with services of carriers other than SBS;
2. Offer and price its EDP equipment and software independently of common carrier communications services that may be utilized by the customer;
3. Will not offer discounts or advantageous terms for the sale of EDP equipment or software because of a particular common carrier communications service;
4. Consult and cooperate in the design and supply of an information processing network with any carrier designated by a customer or potential customer;
5. Enter into agreements with its customers for the provision of EDP equipment and software separate from any agreements entered into by its customers for common carrier communications services.

For its part, SBS will:

1. Market common carrier communications service compatible with EDP equipment and software of vendors other than IBM;
2. Offer and price its common carrier communications services independently of EDP equipment and software that may be utilized by the customer;
3. Not offer discounts or advantageous terms in the furnishing of common carrier communications services because of a customer's use of a particular EDP equipment and software vendor's products;
4. Consult and cooperate in the design and supply of an information processing network with the EDP equipment and software vendor designated by a customer or potential customer;
5. Enter agreements with its customers for the provision of common carrier communications services separate from any agreements entered into by its customers for EDP equipment and software.

26. The three opposing parties contend that these commitments are insufficient deterrents to anticompetitive conduct by IBM and/or SBS. In the event of anticompetitive conduct, remedies are available against SBS under our complaint process. *See* Section 208 of the Act, 47 U.S.C. §208, Sections 1.721-1.735 of the Rules, 47 C.F.R. §§1.721-1.735. In addition we could require SBS to report to us regarding its marketing practices, 47 U.S.C. §218.[15]

[15] We reject Contel's request for a hearing on this issue. The record as it stands is adequate to make our decision. GTE Corp. and Southern Pacific Co., 94 FCC 2d 235, 239-40 (1983).

27. While we make no finding as to IBM's market power, we believe that allowing SBS greater freedom in its marketing practices should benefit the public by making more services available at lower prices without harm to the public in the form of anticompetitive conduct by IBM and/or SBS. Thus we will grant SBS' petition to remove the restrictions noted in para. 1 *supra.*

28. Accordingly, pursuant to Sections 4(i), 214(c) and 303(r) of the Communications Act of 1934, as amended, and Section 102(c)-(d) of the Communications Satellite Act of 1962, as amended, IT IS ORDERED, That the Petition filed by Satellite Business Systems to Modify Conditions of Authorization IS GRANTED, and the conditions of SBS' grant of authority under Titles II and III of the Act ARE MODIFIED AS DESCRIBED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

TABLE 1

FCC APPROVED OPERATING AND AUTHORIZED SATELLITES AND TRANSPONDERS*

	1975		*1977*		*1982*		*1984***		*1987***	
CARRIER	*Sat*	*Trans***	*Sat*	*Trans***	*Sat*	*Trans***	*Sat*	*Trans***	*Sat*	*Trans***
RCA			2	48	5	120	5	120	9	216
WU	2	24	2	24	5	72	4	84	4	96
AT&T			2	48	4	72	4	96	4	96
SBS					3	36	4	48	5	60
SPCC							2	72	3	108
Hughes							3	72	3	72
CSAT							2	54	2	54
USSI							2	48	2	48
Rainbow									2	48
ASC									2	72
ABCI									2	48
Total	2	24	6	120	17	300	26	594	38	918

* Source: For 1975 and 1977, Exhibit C to SBS' September 2, 1983 Response to Staff's August 10, 1983 letter; for 1982, 1984, and 1987, AT&T's *Petition for Further Rulemaking* in Docket No. 79-252, p.9 (August 11, 1983).

** 36-Mhz equivalent.

*** Authorized only at the time AT&T prepared its Petition. See para. 21, supra.

Appendix

INDEX OF FILINGS IN SBS PETITION TO MODIFY CONDITIONS OF AUTHORIZATIONS (ENF-83-16)

1. Satellite Business Systems (SBS) *Petition* to Modify Conditions of Authorizations, filed February 14, 1983.

2. Western Union Telegraph Company (Western Union) *Opposition* to SBS Petition, filed March 25, 1983.

3. Continental Telecom Inc. (Contel) *Comments* on SBS Petition, filed March 25, 1983.

4. American Satellite Company (AmSat) *Opposition* to SBS Petition, filed March 25, 1983.

5. SBS *Motion for Late Acceptance to File Reply*, filed April 8, 1983.

6. SBS *Reply*, filed April 8, 1983.

7. Western Union *Motion for Leave to File Accompanying Response*, filed April 20, 1983.

8. Western Union *Response*, filed April 20, 1983.

9. SBS *Opposition to Western Union Motion for Leave to File Accompanying Response*, filed May 8, 1983.

10. Staff letter of August 10, 1983 from Chief, Common Carrier Bureau, to Assistant General Counsel, SBS (Request for additional information).

11. SBS *Motion for Extension of Time*, filed August 29, 1983 (Granted August 29, 1983).

12. Contel *Request for Extension of Time*, filed August 30, 1983.

13. SBS *Opposition* to Contel's request for extension of time, filed August 31, 1983.

14. Bureau *Order*, granting in part, Contel's request for extension of time, released September 1, 1983.

15. SBS *Response* to staff letter of August 10, 1983, filed September 2, 1983.

16. Western Union *Comments* on SBS Response, filed September 14, 1983.

17. AmSat *Comments* on SBS response, filed September 14, 1983.

18. Contel *Comments* on SBS response, filed September 14, 1983. (Corrected copy filed September 15, 1983).

19. SBS *Motion for Acceptance of Response*, filed September 27, 1983.

20. SBS *Response*, filed September 27, 1983.

21. Staff letter of November 3, 1983, from Chief, Common Carrier Bureau, to Assistant General Counsel, SBS (Request for additional information).

22. SBS *Request for Extension of Time*, filed December 1, 1983 (Granted December 5, 1983).

23. SBS *Request for Extension of Time*, filed January 4, 1984 (Granted January 5, 1984).

24. SBS *Response* to Staff letter of November 3, 1983, filed January 20, 1984.

25. SBS *errata* to January 20, 1984 response, filed January 26, 1984.

26. AmSat *Request for Extension of Time*, filed January 26, 1984.

27. Western Union *Request for Extension of Time*, filed January 26, 1984.

28. SBS Partial Opposition to AmSat and Western Union's request for extension of time, filed January 27, 1984.

29. Bureau *Order* granting Western Union's request for extension of time, released January 30, 1984.

30. Western Union *Comments* on SBS response, filed February 21, 1984.

31. AmSat *Comments* on SBS response, filed February 21, 1984.

32. Contel *Comments* on SBS response, filed February 21, 1984.

33. SBS *Reply* to comments by Western Union, Amsat, Contel, filed March 5, 1984.

Separations Procedures
Settlements

Commission adopted Reconsideration Order affirming earlier decision which preempted state actions requiring carriers to accept the use of seven-day periods for actual use measurements in connection with calculations for separations and settlements purposes.
—*Separations Procedures*

FCC 84-268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: June 15, 1984 Released: July 18, 1984

BY THE COMMISSION:

I. Introduction

1. We have before us petitions for reconsideration submitted by the State Corporation Commission, State of Kansas (KCC), and Reservation Telephone Cooperative, *et al.*, (Reservation). The Commission's *Memorandum Opinion and Order* in this proceeding, 93 FCC 2d 1287 (1983) (hereinafter referred to as *Order*), preempted the Florida Public Service Commission (Florida PSC) from unilaterally requiring carriers to use seven-day studies of holding time minutes of use for interstate toll settlements or for cost allocations between the interstate and intrastate jurisdictions.[1] KCC claims that the Commission's decision to preempt was

[1] Reservation filed its petition on July 12, 1983, under the apparent assumption that the publication of the Memorandum Opinion and Order in this proceeding in the Federal Register (which occurred on June 13, 1983) constituted the public notice triggering the 30-day period for filing such petitions. The Rules of the Commission, however, provide that public notice in all proceedings other than notice and comment rulemakings is given by the release of the document, regardless of whether the document is published in the

factually unsupported, that the *Order* was rendered in violation of procedural requirements, and that the *Order* should, upon reconsideration, be reversed.

2. For the reasons discussed in Part IV, *infra*, we deny the petition. This Order reaffirms our previous ruling that state public service commissions are prohibited from unilaterally requiring that seven-day studies be used for interstate toll settlements by carriers, and from taking any action requiring the use of a particular time period in connection with such measurements for purposes of cost allocations between the interstate and intrastate jurisdictions.[2]

II. Background

3. The *Separations Manual*[3] requires that separations be made on the basis of actual use measured "in studies of traffic handled . . . during a representative period . . . ."[4] On December 14, 1981, General Telephone Company of Florida (GTE of Florida) petitioned the Florida PSC requesting that it require Southern Bell Telephone and Telegraph Company (Southern Bell) to accept seven-day studies for both intrastate and interstate toll revenue divisions between the two companies. The Florida PSC granted GTE's petition[5] and subsequently denied Southern Bell's petitions for reconsideration and for a stay.[6] Southern Bell filed a petition for review in the Supreme Court of Florida and an action in federal court seeking to overturn the Florida PSC decision. After the federal action was dismissed without prejudice, the Florida Supreme Court granted a Florida PSC motion requesting the Court to remand the case back to the Florida PSC for reconsideration. On April 11, 1983, the Florida PSC reversed its Order requiring that seven-day studies be used for interstate toll revenue separations.[7] The Florida PSC did not reach the issue of whether its previous action was preempted by federal law.

Federal Register. *See* Section 1.4(b) of the Rules of the Commission. Although it is necessary to conclude that the Reservation petition was not filed in a timely manner, since the Memorandum Opinion and Order was released on May 10, 1983, we shall accept the Reservation filing and treat it as comments in support of the reconsideration petition filed by KCC.

[2] Order, 93 FCC 2d at 1306 n. 20.

[3] *Standard Procedures for Separating Telephone Property Costs, Revenues, Expenses, Taxes, and Reserves*, published by the National Association of Regulatory Utility Commissioners, and codified as 47 C.F.R. Part 67 (hereinafter referred to as Separations Manual).

[4] Separations Manual, 47 C.F.R. § 67.2.

[5] In re Petition for Resolution of Toll Settlements Disputes Between General Tel. Co. and Southern Bell Tel. & Tel. Co., Docket No. 810474-TP, Order No. 10953 (July 1, 1982) (Florida PSC Order).

[6] Docket No. 810474-TP, Order No. 11110 (Aug. 26, 1982).

[7] Docket No. 8120474-TP, Order No. 11824 (Apr. 11, 1983).

4. Acting on an emergency petition for declaratory ruling filed by Southern Bell on December 3, 1982, we concluded that (1) this Commission possesses specific statutory authority to issue a declaratory ruling in this proceeding, (2) due to the uncertainty regarding the relationship between federal and state authority created by the Florida PSC Order, it was appropriate for this Commission to exercise its authority in this proceeding, and (3) jurisdictional allocation of common carrier costs and subsequent division of interstate toll revenues require a uniform nationwide regulatory scheme. For these and other reasons we preempted the Florida PSC, as well as similarly situated state regulatory commissions, from unilaterally imposing seven-day studies on carriers for interstate toll settlements or for exchange carrier cost allocations between the intrastate and interstate jurisdictions.[8]

III. Positions Of The Parties

A. Petition of KCC

5. KCC makes the following arguments in its petition for reconsideration. First, while KCC was not a party to this proceeding, it is a "person aggrieved or whose interests are adversely affected thereby"[9] since the Commission declared its decision to be binding on "state actions of the type taken by the Florida PSC in this proceeding."[10] Second, the *Order* was an amendment of a substantive rule within the meaning of 5 U.S.C. § 551(5), issued in noncompliance with the Administrative Procedures Act (5 U.S.C. § 553), thus denying KCC due process in this matter, and effectively nullifying the "representative period" requirement prescribed by Section 67.2(a)(2) of the *Separations Manual.* KCC maintains that the Commission disguised its rulemaking by labeling it a declaratory judgment, thereby circumventing Section 67.2(a)(2). Third, there is nothing in the Communications Act of 1934 (1934 Act) which evidences a Congressional intent to preempt states in the separations process. Since the imposition of seven-day studies has not been shown to frustrate any valid federal policies, this area is not a proper one for preemption. Further, KCC argues that federal preemption is valid only when Congress demonstrates that preemption is its clear and manifest purpose.[11]

B. Comments of Reservation

6. In its filing, Reservation first asserts that, in the context of separations studies, seven days is a "representative period" and five days is not. Therefore, it is Southern Bell which, by refusing to accept seven-

[8] See note 2, *supra.*

[9] Section 405 of the Communications Act of 1934, 47 U.S.C. § 405.

[10] Order, 93 FCC 2d at 1304.

[11] KCC Petition at 8 (citing Pacific Gas & Elec. Co. v. Energy Resources, Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1722 (1983)).

day studies and challenging Florida PSC's decision, has tried to change the *Separations Manual.* Since seven-day studies are representative, consistent with the *Separations Manual,* the Florida PSC action did not require a change in the *Manual.* Second, Reservation states that contracts between Bell and independent telephone companies include a clause incorporating the *Separations Manual* by reference. Despite this language, Reservation contends, Southern Bell has accepted only unrepresentative five-day studies for settlements. Further, Bell's policy of refusing to accept representative studies is not nationally uniform, resulting in different treatment of similarly situated independent companies. In effect, the Commission's *Order* has preempted the Florida PSC from disallowing the use of "unrepresentative" five-day studies. Third, Reservation asks the Commission to eliminate the exchange carrier practice of treating similarly situated independent companies differently in the area of allocating costs between interstate and intrastate jurisdictions.

C. Comments of Other Parties[12]

7. Southern Bell asserts that KCC's petition is without merit on two grounds. First, the Florida PSC action conflicted with the Commission's action in freezing the subscriber plant factor (SPF). *See Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* CC Docket No. 80-286, Decision and Order, 89 FCC 2d 1 (1982) (hereinafter referred to as *Amendment of Part 67*). Therefore, the Commission did not engage in rulemaking in this proceeding, but judged the Florida PSC Order to be contrary to existing federal law. Southern Bell Opposition at 7-8. Second, Southern Bell challenges KCC's assertion that the Commission specified the representative study period to be used. *Id.* at 8-10. Southwestern Bell argues that the Commission's declaratory judgment does not change the *Separations Manual,* but expressly leaves the issue of a specific period up to a then pending Joint Board proceeding. Southwestern Bell Opposition at 2-3. Southwestern Bell also claims that a federal district court found a KCC action, similar to Florida PSC's, effectively to unfreeze SPF. Therefore, preemption of the Florida PSC Order was valid in that it prevented possible frustration of federal policy. *Id.* at 4-5. In a separate opposition, Southern Bell and American Telephone and Telegraph Company (AT&T) claim Reservation should be collaterally estopped from arguing the merits of seven-day studies. According to Southern Bell, Reservation has had an opportunity in CC Docket No. 80-286, before the Joint Board, and in its formal complaint, to litigate this

[12] Comments were filed jointly by Southern Bell and American Telephone and Telegraph Co. (Southern Bell), GTE of Florida, Citizens of the State of Florida and National Association of State Utility Consumer Advocates (NASUCA), and Southwestern Bell.

issue and therefore should be estopped. Southern Bell Opposition at 4-8. Further, Southern Bell characterizes the Reservation comments as a collateral attack on the Commission's action freezing SPF in *Amendment of Part 67. Id.* at 9-10. GTE of Florida states that this proceeding does not require the Commission to interpret or reform allegedly discriminatory settlement agreements not before it. According to GTE of Florida, aggrieved carriers should be left to existing procedures and remedies to settle their particular disputes. GTE of Florida Comments at 3-4. NASUCA agrees with Reservation that the Florida PSC action would not violate the Commission's SPF freeze requirement and that the law does not support federal preemption in the separations area. NASUCA Comments at 3-5.

8. On July 1, 1983, GTE Service Corporation (GTE) filed a request for clarification with the Commission regarding paragraph 3 of the *Order.* The discussion in paragraph 3 stated that 1969 and 1970 agreements between GTE of Florida and Southern Bell "[p]rovided that a five-day period would constitute the 'representative period' for purposes of calculating interstate toll revenue divisions between the two companies." *Order* at para. 3. Without reaching collateral issues raised by the parties in their later correspondence submitted to the Commission in this proceeding, we address only the portions relevant to GTE's initial request for clarification.

9. In its filing, GTE asserts that "paragraph 3 incorrectly states that the agreements provide for five day studies for settlement purposes", and that nothing in contracts between GTE of Florida and Southern Bell requires studies to be a specific number of days. GTE Petition at 2-3. Southern Bell's reply disputes GTE's position. Southern Bell contends that "[a]lthough the express terms of the formal agreements may not have explicitly provided for five day periods . . . the lengthy course of conduct between the parties regarding this matter, (1970-1981), precludes [GTE of Florida's] theory that present agreements do not provide for the use of five-day studies." Southern Bell Letter at 2. In its response, GTE asserts that Southern Bell is incorrect in assuming that five days was a contractually mandated "representative period". Since one- and three-day studies were also used between 1970 and 1981, GTE contends that neither the terms nor practices of agreements between Southern Bell and GTE of Florida mandated five-day studies. GTE Letter at 3-4. Southern Bell's response of August 26, 1983, states that neither GTE of Florida nor GTE disputes the first sentence of paragraph 4 of the Commission's *Order* which states that "[t]he two companies continued to adhere to the five-day measurement provision in the intrastate and interstate agreements until December 14, 1981 . . . ."

IV. Discussion

A. Procedure

10. Before discussing this Commission's power to preempt this particular state action, the *Order* set out the procedural grounds for issuance of a declaratory ruling.[13] In summary, 5 U.S.C. § 554(e) and Section 1.2 of the Rules of the Commission, 47 C.F.R. § 1.2, were cited as giving the Commission authority to render declaratory rulings to "remove uncertainty . . . ."[14] Finding that "recent and potential State actions have tended to create uncertainty regarding the scope of State authority to impose requirements that affect both the separations process and processes for making interstate toll settlements . . .", we concluded that the time was proper to clarify states' authority to act unilaterally in the area of jurisdictional separations.[15] KCC challenges the Commission's procedural bases for preemption on several fronts.

11. KCC argues generally that the Commission engaged in a substantive rulemaking by amending Section 67.2(a)(2) of the *Separations Manual* without complying with the procedural requirements of 5 U.S.C. § 553. KCC Petition at 2-8. Section 67.2(a)(2) of the *Separations Manual* provides that studies for division of toll revenues shall be measured over a "representative period." KCC argues that the effect of the Commission's *Order* was to impose the specific time period which is absent from Section 67.2(a)(2). *Id.* at 5-6. Therefore, according to KCC, the Commission engaged in substantive rulemaking and did not comply with the procedural requirements of 5 U.S.C. § 553. *Id.* at 6.

12. The assertion that the Commission somehow imposed the specific "representative period" upon states is without merit. A reading of the *Order* clearly reveals our intent to avoid influencing a pending federal-state Joint Board proceeding:

> We do not intend here to reach the merits of the question whether seven-day studies are the most appropriate actual use measurements for separations and interstate settlements. Our only concern here is to define the parameters of Federal and State authority in these areas.
>
> *****
>
> The issue of appropriate time periods for actual use measurements presently is under consideration by a federal-state Joint Board established under Section 410(c) of the Act, 47 U.S.C. § 410(c).[16]

Our intent was solely to deny the Florida PSC and other state commissions the right to impose unilaterally any specific time as the "representative period."

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[13] Order, 93 FCC 2d at 1289-90.

[14] *Id.*

[15] *Id.* at 1290.

[16] Order, 93 FCC 2d at 1287 n. 1 & 1298.

13. The procedural grounding of the *Order* is bolstered by the fact that the Florida PSC's action would have violated the Commission's SPF freeze[17] by allowing GTE of Florida to increase its interstate SPF. In accord, a federal district court has determined that the KCC, in an action similar to the Florida PSC's, was in violation of the Commission's SPF freeze.[18] From the foregoing, it is apparent that the Commission's *Order* did not formulate a substantive rule. It was declaratory, in that it preempted the Florida PSC from unfreezing SPF in violation of an existing federal rule.

14. KCC further characterized the Commission's *Order* as substantive because it was made generally applicable to all states. KCC Petition at 4. The fact that an order requires similarly situated state commissions to treat this matter in a like fashion has no bearing on whether it is declaratory or a substantive rulemaking. When actions similar to the Florida PSC's are pending elsewhere, it is unclear why KCC expects the Commission to declare this order to be binding on the instant parties only. In the interest of administrative and judicial economy, and because this matter uniquely requires uniform regulation, the *Order* was declared to be binding on all states.

B. Preemption

15. The second part of the discussion in the *Order* analyzed the Commission's statutory and regulatory basis for preempting the Florida PSC's action. KCC advances several arguments against preemption of states in the separations area. First, "[f]ederal legislation [may] preempt State legislation only when ... preemption was the clear and manifest purpose of Congress." *Id.* at 8 (quoting *Pacific Gas & Elec. Co.* v. *Energy Resources, Conservation & Dev. Comm'n,* 103 S.Ct. 1713, 1722 (1983)). The *Order* extensively analyzed preemption and it appears both in case law and on the face of existing statutes that the allocation of interstate toll costs is within the ambit of this Commission's jurisdiction. The courts have recognized that "FCC regulations must preempt any contrary State regulations where the efficiency or safety of the network is at stake ...."[19] Section 221(c) of the 1934 Act, 47 U.S.C. § 221(c), reiterates the goal of uniform regulation in the separations area, and seeks to "[obviate] the danger that certain amounts of plant investments and expenses may be assigned to more than one jurisdiction to the detriment of ratepayers."[20] Further, Section 410(c) of the 1934 Act, 47 U.S.C. § 410(c), while

[17] Amendment of Part 67, Decision and Order, 89 FCC 2d at 6.

[18] Southwestern Bell Tel. Co. v. Kansas Corp. Comm'n, No. 83-4125 (D. Kan. May 16, 1983).

[19] North Carolina Util. Comm'n v. FCC, 552 F.2d 1036, 1046 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977), *quoted in* Order, 93 FCC 2d at 1293.

[20] Order, 93 FCC 2d at 1294 (quoting American Tel. & Tel. Co. & Associated Bell System Cos., 9 FCC 2d 30, 90-91 (1967)).

expanding the role of states beyond that established in Section 221(c), does not diminish federal primacy with regard to jurisdictional separations issues. *See Order*, 93 FCC 2d at 1296. Nowhere in the statute is unilateral authority granted to the states to govern the separations process. The analysis contained in the *Order* clearly demonstrates that existing federal law grants the Commission authority to preempt states in the separations area. Therefore, we reject KCC's initial argument.

16. Second, KCC contends that since compliance with both state and federal regulations is not a physical impossibility, preemption is improper. KCC Petition at 8-9. Clearly, the scope of federal preemption is not limited to "physical impossibility situations." We noted in the *Order* that:

> In the communications common carrier area, ... courts have generally held that State policies must yield to the exercise of Federal authority .... "Courts have consistently held that where state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[21]

17. KCC next claims that the Commission can only exercise preemptive authority by amending the *Separations Manual* through a Joint Board proceeding. KCC Petition at 9-10. This argument lacks merit because it assumes once again that the Commission engaged in a rulemaking or amended the *Separations Manual*, or both. As shown above, we did neither.

18. Regarding this Commission's decision to freeze SPF,[22] KCC and Reservation argue that the Florida action did not unfreeze SPF. KCC Petition at 10; Reservation Comments at 7-8. Both the *Order* and a Kansas District Court[23] have concluded otherwise. By imposing seven-day studies on carriers, the Florida PSC action would allow GTE of Florida to increase its interstate SPF without carrier agreement or amendment of the *Separations Manual*, in direct contravention of this Commission's separations policies. We therefore conclude that the possible unfreezing of SPF, contrary to this Commission's action in *Amendment of Part 67*, and resulting conflict with our separations policies was sufficient grounds for preemption.

19. The conclusion reached in the *Order* that inequitable treatment of ratepayers and carriers would result from inconsistent application of the *Separations Manual* is challenged by KCC as not being a sufficient basis to preempt: "To the extent that carriers may suffer adversely from inconsistent application of the *Separations Manual*, it does not have such

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[21] Order, 93 FCC 2d at 1302 (footnote omitted) (quoting Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198, 214 (D.C.Cir. 1982), *cert. denied sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 103 S.Ct. 2109 (1983)).

[22] Amendment of Part 67, Decision and Order, 89 FCC 2d 1 (1982).

[23] *See* note 18, *supra.*

direct, immediate impact on the national telephone network so as to require FCC preemption." KCC Petition at 10-11. Fostering an environment of fair treatment of ratepayers and carriers through national regulatory uniformity is an important responsibility of this Commission. We reject the view that actual harm to the network, or its direct imminence, must be present before the Commission is authorized to act. As pointed out in the *Order*:

> The Joint Board procedures established in Section 410(c) of the Act ... would be largely nullified, and the plenary authority of the Commission in the separations and settlements areas would be effectively undermined, if we were to accept the view that States have independent authority to impose changes in interstate settlements practices and separations procedures.[24]

20. The thrust of Reservation's challenge to the *Order* is the argument that (1) five-day study periods are unrepresentative, and (2) the Florida PSC attempted to stay within the *Separations Manual* by only accepting seven-day studies for toll revenue settlements. This line of argument is flawed in three respects. As discussed earlier, a change in the number of days to be used for traffic studies can only be accomplished by carrier agreement or by amending the *Separations Manual.* Unilateral action in the separations area has already been shown to be outside state authority. *See* para. 15, *supra.* The conflict with the Commission's SPF freeze requirement also militates against the Florida PSC's action. Further, Reservation's comments focus on the appropriateness of seven-day studies, rather than the central issue of federal-state authority. Nowhere in the *Order* did we reach the issue of the appropriateness of seven-day studies. *Id.*

21. Reservation further asserts that similarly situated independent telephone companies are discriminated against by AT&T and the Bell Operating Companies, that the use of five-day studies is not a result of carrier agreements, but of what Bell insists on using, and that the Commission has a positive legal duty to eliminate such discrimination and prejudice. Reservation Comments at 2-4, 8-9. In response to Reservation's request that the Commission institute proceedings against Southern Bell, we conclude that this matter is outside the scope of this reconsideration proceeding. *See United Telephone Co. of the Carolinas* v. *FCC*, 559 F.2d 720, 723 (D.C.Cir. 1977).

22. Finally, the dispute which has arisen between Southern Bell and GTE of Florida, described in paragraphs 8 and 9, *supra,* is far removed from the central focus of the *Order.* By way of clarification, we note that our purpose in paragraphs 3 and 4 of the *Order* was to describe the arrangements and practices which were in place between Southern Bell and GTE of Florida and which gave rise to the central issues addressed in

[24] Order, 93 FCC 2d at 1304.

the *Order*. It was not our intent to render any interpretation of the terms of the contracts between Southern Bell and GTE of Florida.

V. Ordering Clauses

23. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by the State Corporation Commission, State of Kansas, IS DENIED.

24. IT IS FURTHER ORDERED, That the Motion to Accept Late Filed Comments by The Citizens of the State of Florida and National Association of State Utility Consumer Advocates is GRANTED.

25. IT IS FURTHER ORDERED, That the Secretary shall cause this Order to be published in the Federal Register.

26. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Dual City Identification
Station Identification

Petition for partial reconsideration of *Report and Order*, 95 FCC 2d 1253, denied. Petitioner has not set forth sufficient grounds for conditioning multi-city station identification on compliance with a signal coverage requirement.
—*Station Identification*
BC Docket No. 82-374

FCC 84-339

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.1201(b)(2) of the Commission's Rules — Additional City Identification	BC Docket No. 82-374

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1984; Released: July 27, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

Background

1. The Commission has before it a petition for partial reconsideration of our *Report and Order* in this proceeding,[1] filed by the National Association of Broadcasters ("NAB"). No oppositions or reply comments were filed in response to NAB's petition.

2. In our *Order*, we modified the substantive and procedural requirements for obtaining authority for multi-city identification by AM, FM, and television stations as set forth in Section 73.1201(b)(2) of the Commission's Rules. Specifically, our action authorized licensees to include in their official station identifications the names of any additional communities, provided only that the community to which a station is licensed is named first. In making this rule change, we eliminated the substantive requirement that a station place a principal-city signal over the additional

[1] FCC 83-487, 48 Fed. Reg. 51304 (November 8, 1983), 54 R.R. 2d 1343 (1983).

community in question.[2] We also abolished the procedural requirement that a broadcaster file an application requesting authority to identify with additional communities. In addition, we provided that a licensee need not notify the Commission of changes in its manner of identification. Finally, our action eliminated Commission consideration of several non-technical factors that previously could have precluded multiple city identification[3] and terminated Commission adjudication of contested multi-city identification cases.

NAB's Petition

3. NAB's petition for reconsideration is principally directed to that aspect of our decision which eliminated signal coverage as a consideration in additional city identification matters. NAB contends that our action in this regard was unjustified and that some minimum coverage criterion should be reinstated. While in its original comments in this proceeding NAB supported retention of the former city-grade coverage requirement, along with a liberal waiver procedure, it now urges adoption of another signal coverage standard, albeit, a less onerous one.[4]

4. In support of its position, NAB contends that retaining a reduced signal coverage requirement is necessary to prevent confusion to both the public and advertisers, caused by the combined effect of our actions in this docket and in the related call sign proceeding.[5] Specifically, NAB argues that, as a result of the Commission's action in this proceeding, there is no limitation on the ability of broadcasters to identify with any other community, causing listeners and advertisers to place greater

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[2] Pursuant to Sections 73.188(b)(1) and 73.315(a) of the Commission's Rules, the minimum principal-city signal levels are 5.0 mV/m for AM stations and 3.16 mV/m for FM stations. For television stations, the principal-city signal levels are 5.0 mV/m for channels 2-6, 7.0 mV/m for channels 7-13, and 10.0 mV/m for channels 14-69. Section 73.685(a) of the Rules.

[3] These non-technical factors included "mutuality" (*i.e.*, whether an opposing station would be eligible for additional city identification) and the viability of the requesting and opposing stations.

[4] NAB suggests that, as a minimum requirement, the Commission should use the 0.5 mV/m contour for AM stations and the 1.0 mV/m contour for FM stations, which were the accepted service areas used in connection with the former policy concerning inaccurate coverage maps and promotional material. As an alternative, NAB requests consideration of a 2.0 mV/m contour for AM and 2.0 or 1.5 mV/m level for FM stations as more appropriate "core area" measures for multi-city identification purposes. For television stations, NAB believes that a reasonable coverage standard would be the Grade A contour or the presence of a station in an Area of Dominant Influence (ADI) or Designated Market Area (DMA). With respect to the latter, if a station were located within an ADI or DMA, NAB believes that it should be permitted to identify with any community included within that ADI or DMA.

[5] *Report and Order* in MM Docket No. 83-373, 48 Fed. Reg. 57133 (December 28, 1983), 54 R.R. 2d 1493 (1983), *recon. denied* FCC 84-299, Mimeo No. 34718 (adopted June 27, 1984).

reliance upon a station's call letters as a means of distinguishing among stations. However, NAB believes that the Commission's recent *Report and Order* in MM Docket No. 83-373 jeopardizes such reliance because it eliminates Commission adjudication of claims that the use of certain call letters would be confusing with those already assigned to other stations in a given area. As a result, NAB asserts, stations may now utilize substantially similar call letters as well as the same cities in their official station identifications, and that the net effect of this combination is to "create a confusing rather than just a competitive environment that will not be conducive to the efficient operation of market forces."[6]

5. NAB also contends that elimination of the coverage requirement represents an unwarranted abdication of Commission allocation responsibilities under Section 307(b) of the Communications Act of 1934, as amended, in that it fosters *de facto* reallocation of broadcast facilities. NAB notes that it raised this argument in its initial pleadings in this proceeding and that the Commission rejected the argument on the basis of its recent abolition of the *de facto* reallocation policy.[7] NAB now argues that the Commission's reliance in eliminating the coverage requirement on its earlier action deleting the *de facto* reallocation policy was premature because that action is currently before the courts on appeal and is not yet final.[8]

6. Additionally, NAB urges the Commission to provide a forum for the resolution of complaints alleging noncompliance with the proposed signal coverage requirement. Moreover, NAB contends that, in the event the Court of Appeals overturns the Commission's decision eliminating the *de facto* reallocation policy, the Commission should consider multi-city identification practices as relevant evidence in resolving *de facto* reallocation allegations.

Discussion

7. After consideration of NAB's petition, we conclude that modification of our *Order* in this proceeding is not warranted. We are not persuaded that our new additional city identification rules, even when considered in light of our action in the call sign proceeding, pose any significant risk of confusion to either advertisers or the public. In this regard, NAB has submitted nothing beyond its assertions to demonstate that our elimination of the coverage requirement would, on balance, exacerbate the confusion which it alleges will result from our call sign decision. Indeed, it appears that the greater freedom in selecting

[6] NAB Petition at 4.

[7] *Report and Order* in BC Docket No. 82-320, 93 FCC 2d 436 (1983), *recon. denied* FCC 84-335, Mimeo No. 34759 (adopted July 12, 1984).

[8] *Channel 287, Inc. v. FCC*, No. 83-1520 (D.C. Cir., filed May 13, 1983).

communities for inclusion in a station's official identification which our initial action affords might as easily function to better distinguish stations with similar sounding call letters as it would to aggravate the similarity. In any event, even assuming that there may be instances where the possibility of confusion is heightened, we do not believe these situations will occur with such frequency or will threaten such harm as to justify Commission intervention.[9]

8. First, as we indicated in our *Order*, advertisers are not likely to be confused because they need not rely on a station's official identification in determining the coverage of a station. On the contrary, sophisticated market survey data are readily available to aid advertisers in determining the extent and composition of a station's audience. NAB has not presented any evidence to refute this point or to show how advertisers would be confused.

9. Second, although the Commission will no longer adjudicate disputes involving the use of similar sounding call letters, such issues may nevertheless be litigated in local courts. Additionally, even if stations with similar sounding call letters have the same official identifications, it would not necessarily cause public confusion. Stations frequently use promotional identifications to maintain a unique station identity.[10] These promotional identifications may be used in lieu of call letters except during times when an official station identification is required. Furthermore, the public can often easily distinguish among stations with similar call letters because they use different entertainment formats and frequencies. Finally, the continuing obligation under Section 73.1201(b)(2) of the Commission's Rules to list a station's community of license before additional communities in an official identification will reduce the liklihood of public confusion where stations with similar call letters have different communities of license.

10. With respect to the contention that elimination of the coverage requirement was premature given the pending appeal of our decision deleting the *de facto* reallocation policy, we find NAB's argument misplaced. Once an agency has determined in a rule making proceeding that a policy should be eliminated, it need not continue to apply that policy pending judicial review. *Washington Association for Television and*

[9] As we recently noted in denying petitions for reconsideration in the call sign proceeding, only about 1 percent of all call letter requests generate objections that are ultimately sustained. *Memorandum Opinion and Order* in MM Docket No. 83-373, *supra* n.5, at para. 7.

[10] For example, FM broadcast station WRQX, Washington, D.C., refers to itself promotionally as "Q107."

Children v. FCC, 665 F.2d 1264 (D.C. Cir. 1981).[11] It follows that our reliance on the *de facto* reallocation decision in rejecting NAB's allocations arguments opposing elimination of the signal coverage requirement was neither premature nor improper. Accordingly, we shall not withdraw our action in this proceeding pending the completion of judicial review in the *de facto* reallocation proceeding.[12]

11. We continue to believe that broadcasters should have the discretion to include additional communities in their official station identifications irrespective of the level of coverage over such communities. To a large extent, the rule was originally designed to protect advertisers from misleading coverage claims. However, we determined that protection of advertisers is not an appropriate regulatory concern inasmuch as advertisers are able to protect themselves and have recourse to private legal remedies if they are damaged by a misrepresentation.[13] Furthermore, we can perceive no appreciable risk of harm to the public by eliminating the coverage requirement. On the contrary, station identifications will most likely reflect the actual markets that stations intend to serve or from which they derive advertising revenue. Additionally, elimination of the coverage requirement has made it possible for us to terminate Commission adjudication of multi-city identification matters, thereby reducing application burdens on broadcast stations and administrative burdens on the Commission.

12. Accordingly, IT IS ORDERED, That the Petition for Partial Reconsideration filed by the National Association of Broadcasters IS DENIED.

13. Authority for this action is contained in Sections 4(i), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended.

14. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[11] Specifically, the court stated that "[t]o hold that a repealed policy must be applied pending judicial review would tie an agency's hands for the frequently long periods during which appeals await disposition in the courts." *Id.* at 1268-69.

[12] If the court were to reverse the Commission's decision in the *de facto* reallocation proceeding and if the Commission were to decide subsequently to retain a *de facto* reallocation policy, the Commission could consider at that time whether multi-city identifications should be relevant to *de facto* reallocation determinations. However, at this time, such a determination is too speculative to warrant any further action in this proceeding.

[13] *See also Policy Statement and Order* ("Elimination of Unnecessary Broadcast Regulation"), FCC 83-339, 48 Fed. Reg. 36254 (August 10, 1983), 54 R.R. 2d 705 (1983).

Frequency Efficient Use of
Paging Service
State Law

Petitions for reconsideration of amendment of Parts 2 and 73 pertaining to preemption of state statutes regulating entry of radio common carrier paging services on FM subcarriers granted to an extent. Commission preempts state regulation that prohibits or impedes entry based on desire for spectrum efficient services fulfilling a public need. Petitions to repeal Section 22.516, traffic load studies, granted to an extent. Petition to consider variable-tuned FM subcarrier receivers denied.
—*Subsidiary Communications Authorization*
BC Docket No. 82-536

FCC 84-187

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	
Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization	BC Docket No. 82-536

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1984; Released: May 2, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

Introduction

1. On April 7, 1983, the Commission adopted a *First Report and Order* in BC Docket No. 82-536 amending Parts 2 and 73 of the Commission's Rules concerning use of subsidiary communications authorization.[1] Petitions for reconsideration were filed by the National Radio Broadcasters Association (NRBA), National Association of Broadcasters (NAB), the law firm Fletcher, Heald and Hildreth (Fletcher) on behalf of

[1] 48 FR 28,445, June 22 (1983).

their FM licensee clients, Telocator Network of America Inc. (Telocator) and Reach, Inc. Several parties filed Oppositions to Petitions for Reconsideration.[2] Replies to the Oppositions to Petitions for Reconsideration were filed by Fletcher, NAB and Reach.

2. In general, the Petitions for Reconsideration focus on the issue of preemption of state regulation with respect to paging services operating on FM subcarriers. Based on our review of the issues raised by these parties and our desire for spectrum efficient services fulfilling a public need, we are preempting state regulation that has the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers. The action we take today is a measured one designed only to insure the accomplishment of legitimate federal interests and is in no way intended to impinge upon regulation by state authorities to the extent such regulation does not have the effect of prohibiting or impeding entry.

Background

3. The Commission's *First Report and Order* removed long standing restrictions that limited the use of FM subcarriers and caused this resource to remain underutilized. Specifically, the major policy change established in the *First Report and Order* permits FM subcarriers to be used for non-broadcast as well as broadcast services. Broadcast-related services available on FM subcarriers may include enhancing main channel programming with stereo or quadraphonic sound; station cuing control and meter reading; and narrowcasting services such as background music, radio reading services, foreign language programming and various types of informational and instructional programming. Non-broadcast services may be similar to services presently being provided by licensees in the private radio services and/or the common carrier services. Included in such non-broadcast services are paging services. In the *First Report and Order* the Commission determined that FM subcarriers used for non-broadcast related Communications will be treated in the same general manner, as the providers of similar services in private radio and common carrier. However, the overall intent of the *First Report and Order* was to remove restrictions on FM subcarrier use and to foster efficient use of underutilized spectrum in serving the needs of the public.

4. The remaining policy changes contained in the *First Report and Order* include eliminating time restrictions on subcarrier operation; expanding the usable channel baseband to permit instantaneous sidebands up to 99 kHz; and eliminating the restriction that subcarriers be

[2] Commenting parties include: Telocator, Reach, Bell Operating Companies, American Foundation for the Blind, Westinghouse Broadcasting and Cable, Inc., Minnesota State Services for the Blind and Visually Handicaped, North Carolina Association of Broadcasters, NAB, and the Association of Reading Services, Inc.

frequency modulated. Regarding procedural matters, the *First Report and Order* eliminated the program log requirement for subcarrier operations and eliminated the requirement for a formal subcarrier application (Form 318). In the *Second Report and Order* adopted in this proceeding the Commission increased the modulation levels to 110% when subcarriers are transmitted.[3]

5. In summary, the *First Report and Order* represents a major effort on the part of the Commission to ensure efficient FM spectrum utilization and to remove unnecessary burdens imposed on FM licensees due to overly restrictive rules.

Summary of Petitions

6. *Preemption.* The petitions for reconsideration and subsequent oppositions and replies focus primarily on the issue of preempting state regulations regarding entry into common carrier paging services.

7. Fletcher, NAB, and NRBA, in their petitions, argue that the intent of the *First Report and Order* will be frustrated by anticompetitive state entry restrictions and that the Commission has the authority to preempt state entry regulation.

8. Reach, in its petition argues that limited preemption is clearly within the Commission's authority and that such action is necessary if any significant use is to be made of FM subcarriers. In its analysis, Fletcher reports that only 21 states including the District of Columbia have open entry requirements for paging services while the remaining states impose three general types of entry burdens on prospective paging carriers. Specifically, fifteen states enforce what Fletcher calls exclusionary statutes—requiring the prospective entrant to show need for its proposed service and prove that the proposed service will cause no economic harm to the existing carrier and that the existing carrier cannot satisfy the demand. The second class of paging entry statutes is defined by Fletcher as restrictive. In this category six states require the prospective entrant to demonstrate an unmet need for the proposed service. In this situation an existing paging service operator can intervene in the certification process of a proposed new applicant by protesting the application and showing that the unmet need can be served by the existing carrier; or that the addition of another paging service will injure that service of the existing operator. The final category of states have certification statutes that require the applicant to demonstrate some level of unmet need for the proposed new service, however these states do not protect established carriers *per se.* Fletcher's review of state statutes demonstrate that in a majority of the states, regulations pertaining to entry into a paging service via FM subcarriers will be both time consuming and expensive.

[3] 49 F.R. 15,079, April 17, 1984.

Because of these state statutes, competition between FM subcarrier paging service and traditional radio common carrier paging services may never occur. The result of such entry regulations would be both inefficient use of the spectrum and the interest and need of the public going unserved.

9. Telocator Network of America argues that petitions filed by Reach, Fletcher, NAB and NRBA requesting preemption of state regulatory statutes represents an effort to expand their competitive advantage over radio common carriers providing paging services. Telocator contends that the Commission does not have the power to preempt state regulations governing entry and that no basis has been established in this proceeding for the exercise of such power. Telocator characterizes paging services as predominantly intrastate and local exchange in nature. Therefore, it asserts that petitioners request for preemption is inconsistent with the Commission's authority. Specifically, Telocator interprets Section 331(c)(3) as prohibiting the Commission from using its radio licensing powers to preempt state regulation of paging service entry, rates or practices.

10. The Bell Operating Companies (BOC) argue that "to exempt one group of competitors from this regulation [preemption] would be to give those entities a competitive advantage over their regulated counterparts because the unregulated entities would be better situated to respond to market conditions than the regulated entities." Giving advantage to certain entities because they are FM broadcasters, according to BOC, would be totally unwarranted.

11. *Traffic Load Studies.* A second issue raised by the petitioners was a request to repeal or waive Section 22.516 of the rules for FM subcarriers. Section 22.516 of the rules requires that traffic load studies be conducted in conjunction with an application requesting the assignment of an additional frequency for an existing one-way signaling station or in conjunction with an application requesting the assignment of one or more additional frequencies for an existing two-way station. The NAB argues that the Commission should not apply Section 22.516 of the rules to FM subcarriers. NAB states that the lack of use of a subcarrier leased by a radio common carrier should not affect the radio common carrier's showing for an additional regular paging channel. The intent of this rule, according to NAB, is to prevent frequency warehousing and promote channel availability. NAB contends that "existing common carriers who attempt to foreclose new competition by 'warehousing' their own channels do so at no cost to themselves, because they already control underutilized channels." Warehousing FM subcarriers would require a leasing arrangement with broadcasters. The cost of leasing subcarriers combined with increased availability of channels decreases the likelihood of foreclosing competition by warehousing.

12. Reach also agrees that the premise behind Section 22.516 is no longer valid as it applies to FM subcarrier paging services. Requiring existing radio common carriers to demonstrate a fill requirement in order to lease subcarriers will restrict competition in the provision of FM subcarrier paging. Reach also argues that leasing costs serve as an inhibitor to anyone who might wish to warehouse all possible paging channels. Reach, however, does qualify its request to repeal Section 22.516. They argue that " . . . restricted radio common carrier entry into subcarrier paging imposed by Section 22.516 balances the restricted entry by others that exists because of various state restrictions on competitive radio common carrier services." Repealing Section 22.516 without pre-empting state entry practices would leave many FM licensees unable to enter the paging market themselves, and also unable to lease their subcarriers for paging purposes to anyone other than the existing local radio common carrier.

13. Telocator, like NAB and Reach, requests that the Commission repeal Section 22.516 for radio common carriers who choose to lease one or more FM subcarriers in the same market where they operate radio common carrier paging services. The discipline of marketplace forces dictate that warehousing of FM subcarriers by radio common carriers would be unlikely. Therefore, according to Telocator, there is no justification for wasting either the applicant's time or resources preparing Section 22.516 exhibits.

14. In summary, all parties agree that Section 22.516 should be repealed for radio common carrier seeking to operate paging services on FM subcarriers within the same market as the existing radio common carrier's paging service. The commenters believe that the economies involved in leasing FM subcarriers would work against radio common carriers' warehousing spectrum.

15. *Remaining Issues.* The remaining issues raised by petitioners include a request that the Commission: a) modify the radio common carrier application form for those wishing to operate paging services on FM subcarriers; and b) reexamine the issue of variable tuned FM subcarrier receivers.

Discussion

16. *Preemption.* In our *First Report and Order* in this proceeding we adopted what we believed was a flexible set of rules to govern the telecommunications services offered by means of FM radio station subcarriers. The rules were thought to be appropriate in light of the apparently competitive nature of the services that would be provided and the need to provide flexibility for entrepreneurial and technical innovation in untried areas of service. Additionally, the rules were designed to promote the rapid introduction of service to the public, to encourage the

use of what had been a largely fallow communications resource, and to permit the transmission of a variety of services including private or common carrier communications in conjunction with a broadcasting facility. We also indicated that private systems operating on FM subcarriers were exempt from state and local regulation in accordance with Section 331(c)(3) of the Act.[4,5] On reconsideration, however, several entities have requested that we also preempt state regulation of FM subcarrier services offered on a common carrier basis because state regulation has proven to be a barrier to the development and provision of new or additional common carrier services over FM subcarriers.[6]

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[4] Section 331(c)(3) provides that ". . . no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . .". 47 U.S.C. § 331(c)(3).

[5] Once a service is classified as private under the statutory test contained in Section 331(c) of the Act, it is exempt from state and local regulation. This enables the Commission to expedite the availability of private carrier services through FM subcarriers without unnecessary restrictions. FM broadcast licensees seeking to provide private carrier paging service must notify the Licensing Division of the Private Radio Bureau in Gettysburg, Pennsylvania, 17325, by letter certifying that their facilities will only be used for permissible purposes under 47 C.F.R. Parts 90 and 94, and that the service will only be offered to users eligible under 47 C.F.R. Part 90 of the rules. They must also certify that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with Section 331 of the Act. The letter of notification is all that is required to be sent to the Commission. There are no application forms, and no separate licenses will be issued. In addition, the letters of notification do not give rise to a comment period or petitions to deny. As a result of these simplified procedures, the Private Radio Bureau already has received 50 letters from FM broadcast licensees, notifying the Licensing Division that they are initiating private carrier service on subcarrier facilities.

[6] This proceeding and the discussion herein concern the regulatory treatment of FM radio station subchannel communications services. Comparable kinds of communications, with some technical variations, may also be distributed using the ancillary communications capacity on the vertical blanking interval of television stations or on television broadcast station subchannels. In authorizing expanded uses of these communications channels, we have followed the same pattern adopted with respect to FM subchannels. Petitions asking for reconsideration of our teletext decision (*Report and Order in BC Docket 81-741*, FCC 83-120, __ FCC 2d __ (Released May 20, 1983)) raised issues substantially identical to those raised here. In addition, in our decision authorizing nonbroadcast uses of television subchannels (*Second Report and Order in Docket 21323*, FCC 84-116, __ FCC 2d __ (Released April 23, 1984)), we specifically indicated that the resolution of the preemption issue with respect to FM subchannels would cover TV subchannels as well. All the comments concerning this issue that have been submitted in those proceedings have been considered. Accordingly, we regard the decision herein to be dispositive of the state regulatory preemption issues for television ancillary services as well as for those offered over FM subchannels. Copies of this *Memorandum Opinion and Order* will be filed in Dockets 81-741 and 21323. We have proposed to follow the same pattern in the AM broadcasting areas as well. (*Notice of Proposed Rulemaking in MM Docket 83-1322*, FCC 83-571, FCC 2d __ (Released December 14, 1983). *See also Notice of Proposed Rulemaking in MM Docket 84-168*, FCC 84-50, __ FCC 2d __ (Released March 8, 1984).

17. Those favoring preemption contend that preemption will benefit the public by increasing competition, enabling businesses to be flexible in their service offerings, and encouraging more efficient use of the radio spectrum. In particular, they emphasize the overriding federal responsibility for management of the radio spectrum and the broad powers necessarily accorded the Commission in carrying out that responsibility. On the other hand, several commenters have questioned our legal authority to preempt state regulation. They have argued that it is inequitable to treat communications service offerings over FM broadcast subcarriers differently than similar conventional radio common carrier services. After reviewing the various arguments presented, we are persuaded that state regulation that has the effect of prohibiting of impeding entry of common carrier FM subcarrier services frustrate legitimate federal objectives and should be preempted for the reasons described below.

18. Although we believe preemption of this state regulation to the limited extent indicated herein is warranted in this instance, we reach that conclusion fully cognizant of the fact that we have historically permitted the states to regulate the various facets of common carrier mobile services, such as paging.[7] We also recognize that because we are engaging in this limited preemption of common carrier radio services offered on FM subcarriers, but not conventional common carrier radio services, there will be some disparity in treatment of similar services. However, because the record in this proceeding only addresses the problems that have arisen with state entry regulation of common carrier services offered on FM subcarriers, and in particular paging, this proceeding does not provide the appropriate vehicle for changing existing policies relating to state entry regulation of conventional radio common carrier services. In light of that potential disparity in treatment, however, we expect to issue a notice of proposed rulemaking addressing the need to preempt state regulation that has the effect of prohibiting or impeding the entry of conventional common carrier mobile services in the foreseeable future.

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[7] *See e.g., Mobile Tariff Filings*, 1 FCC 2d 830 (1965), reprinted, 53 FCC 2d 579 (1975); *Morrison Radio Relay Corp.*, 31 FCC 2d 612, 616 (1971); *First Report and Order*, CC Docket No. 20870, 69 FCC 2d 398, 402-404 (1978), *recon. denied*, 80 FCC 2d 294, 296-297 (1980); *Curtin Call Communications, Inc.*, 62 FCC 2d 211 (1976); *Canaveral Communications*, 24 FCC 2d 279, *recon. denied*, 26 FCC 2d 73 (1970). Indeed, Section 22.13(f) of the Commission's rules requires all common carrier mobile service licensees to demonstrate compliance with state certification requirements. To the extent we are today preempting state entry regulation, that provision will not apply to any licensees providing common carrier mobile services over Teletext and TV and FM subcarriers.

19. With respect to preemption, the Supreme Court recently indicated that Congress may preempt state law in either of two general ways.[8] First, even in the absence of explicit preemptive language,[9] Congress may implicitly indicate its intent to completely occupy a given field, and any state law encompassed within that field would automatically be preempted. Such intent could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it.[10] Second, in those instances where Congress has not entirely displaced state regulation, state law can be preempted to the extent it actually conflicts with federal law. Such conflicts may occur when "compliance with both Federal and State regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings and Loan Association v. de la Cuesta, supra.* Our decision to preempt state entry regulation is based upon the conflict between state entry regulation in this instance and this Commission's federal objectives.

20. Initially, we conclude that whenever a common carrier intends to provide interstate paging services utilizing a network of subcarriers, this Commission may preempt state entry regulation to the extent such regulation impedes the development of that service.[11] Moreover, because interstate systems also provide intrastate services between two or more cities in the same states, those intrastate services are technically and practically difficult to separate from the interstate services, we may also preempt state entry regulation of the intrastate paging services. *See California* v. *FCC*, 567 F. 2d 84, 86 (D.C. Cir. 1977), *cert. denied* 434 U.S.

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[8] *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983); *Silkwood v. Kerr-McGee Corporation*, 104 S. Ct. 615 (1984).

[9] As previously noted, Section 331(c)(3) explicitly provides for preemption of state and local government regulation of private carriers.

[10] *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1983); *Rice v. Santa Fe Elevator Crop.*, 331 U.S. 218, 230 (1947); *See also Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, supra* at 1722.

[11] *See Orth-O-Vision*, 69 FCC 2d 657 (1978), *aff'd sub nom.,New York State Commission on Cable Television v. FCC & USA*, 669 F. 2d 58 (2d Cir. 1982); *Telerent Leasing Corp.*, 45 FCC 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976); *First Report and Order*, Docket 80-183, 89 FCC 2d 1337 (1982), *reconsideration denied in part*, 93 FCC 2d 908 (1983), aff'd mem. sub nom. *National Ass'n of Reg. Util. Commissioners v. FCC*, No. 83-1485 (D.C. Cir. 1984).

1010 (1978). In this regard, several commenters have indicated an interest in constructing nationwide or regional paging or data distribution systems that would encompass several states. Such systems would be comprised of numerous, interconnected local systems operating on either a common carrier or private radio basis.[12] Reach, Inc., in particular, has already signed up numerous FM stations themselves or leasees of FM subcarriers in cities across the country in an effort to develop a nationwide paging system.[13] Such systems are designed to make it possible to lease or purchase a subcarrier receiver and then receive a page or other communication virtually anywhere in the nation.[14] However, for such services to be economically viable, the system should, at the minimum, encompass all states in a region. State regulations precluding or impeding operations in any significant portion of the country or region are likely to make operation of such services a practical impossibility. For example, a regional system servicing Delaware, Pennsylvania, New Jersey, and Connecticut would would not be viable if service to New York — a major business center with substantial tourist trade — were not included as a result of the licensee's inability to obtain state common carrier certification from New York. Any such preclusion or impediment would be a direct burden upon interstate communications and hence conflicts with our licensing functions and authority to regulate such interstate systems under the Communications Act.[15]

21. Because this state regulation over local services conflicts with our authority under Section 301 of the Communications Act, we are also preempting state regulation of local services where such regulation has

[12] With respect to nationwide private carrier systems, the Private Radio Bureau, on October 21, 1982, granted 39 applications filed by Millicom Corporate Digital Communications, Inc., for 39 individual land station licenses to enable Millicom to operate as a nationwide Private Carrier Paging System ("PCPS") on the frequency 929.9875 MHz in 39 locations throughout the United States. In addition, the Commission allocated four of the private channels in the 929-930 MHz band for multi-location paging operations. Licensees authorized to provide a multi-area paging service were also permitted to provide local service in any part of the multi-area system. *Memorandum Opinion and Order*, Docket No. 80-183, FCC 83-513, released November 23, 1983.

[13] A February 15, 1984, Reach prospectus lists agreements of agreements in process to use the subcarriers of 118 stations for private or common carrier communications.

[14] Because many radio stations already have satellite reception equipment installed, it may well be possible for these communications to be distributed piggybacked on existing radio broadcast network services.

[15] We realize, however, that because of the intrastate or local characteristics, the states may have some interest in whether such services are authorized. Accordingly, the states, like any other interested party, may raise their concerns with this Commission whenever an entity applies to us for permission to commence common carrier subchannel operation. See also, footnote 29 *infra*. Moreover, we note that the states may impose regulations that do not prohibit or impede entry, for example, notification requirements *See* footnote 31, *infra*.

the effect of prohibiting or impeding entry. Section 301 requires the Commission "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels . . . by persons for limited periods of time, under licenses granted by Federal authority . . . ." Thus, Section 301 confers broad powers upon this agency to regulate the licensing or franchising of facilities.[16] The record before us amply demonstrates that, in this instance, state regulation that has the effect of prohibiting or impeding entry conflicts with our authority to license channels and determine their use. First, whenever a state denies certification to one of our licensees, there may result a clear conflict with our public interest determination that licensing of the service will serve the public interest. Here, several commenters argue that they have already experienced difficulties in obtaining state authorization for these services.[17] In addition, the commenters have provided us with a detailed list of all state laws regulating entry.[18] Those lists demonstrate that in numerous states our common carrier licensees must meet virtually insurmountable burdens before the states will permit them to offer service. For example, those state laws generally require a showing that there is an unmet need for the service and that existing licensees cannot or will not satisfy that need. Thus, even where applicants can demonstrate that an unmet need exists, existing licensees are almost always willing to satisfy that need and certification is denied. As a result, our licensees are usually unable to obtain certification in those states. Consequently, even though we have concluded that the public interest warrants the licensing of these common carrier radio facilities, state certification requirements, as a practical matter, entirely foreclose their construction and operation. Because these state certification requirements operate to prevent fulfillment of our licensing activities under Section 301, we conclude that preemption of those requirements is warranted.

22. Additionally, the mandate of Section 301 that we provide for the use of channels authorizes the Commission to allocate the Nation's scarce spectrum resources.[19] In attempting to satisfy that mandate, the public's need for new or additional services must be balanced against the limited

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[16] *See National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 173 U.S. App. D.C. 413, 429 (1976).

[17] *See, e.g.*, Petition for Reconsideration and Consolidated Reply of Reach, Inc.

[18] *See* February 3, 1984 Memorandum filed in the record on behalf of Reach, Inc.

[19] *See e.g., Notice of Inquiry*, Gen. Docket 82-334, F.C.C., 82-286, mimeo No. 31575, released July 9, 1982; *Notice of Proposed Rule Making* Gen. Docket 82-334, F.C.C. 83-2, mimeo 32629, released January 13, 1983 in (48 Fed. Reg. 67302); *First Report and Order*, Gen. Docket 82-334, 54 RR 2d 1001 (48 Fed. Reg. 50, 722) (1983). This proceeding among other things addresses some of the problems we have experienced because of scarcity of spectrum and proposes several solutions.

spectrum currently available. In sum, we must strive for economy in the use of spectrum. Our decision to authorize nonbroadcast uses of FM subcarriers was premised upon the spectrum efficiencies that may be gained from a concurrent use of frequencies for both broadcast and nonbroadcast purposes. Such efficiencies promote national spectrum allocation policies by ensuring that spectrum does not remain unused. Furthermore, such policies also enable us to conserve valuable spectrum resources that otherwise would have to be allocated to each service individually. For example, although the Commission has allocated spectrum specifically for paging purposes, a very significant growth in demand for this service is projected,[20] and some, including Telocator, sought additional frequencies including channels for nationwide service.[21] Thus, it is evident that common carrier paging services are much in demand and provide an important use for the previously unused FM spectrum. State regulation that has the effect of prohibiting or impeding entry frustrates our objective of enabling beneficial use of this spectrum. Accordingly, we believe that limited preemption of state regulation of services authorized on FM subcarriers is necessary in order to ensure that the additional spectrum we have made available will not continue to remain unused.

23. Moreover, this Commission has, in conjunction with its spectrum licensing and allocation functions, developed rules and policies that strongly favor and encourage competition. For instance, in *Cellular Communications Systems, supra,* we provided that there be two entities offering service in each market, and we specifically foreclosed the states from altering that market structure. Additionally, to prevent mobile licensees from requesting additional facilities for the purpose of excluding potential competition, we have, in the past, found it to be necessary to require them first to demonstrate adequate loading on their existing channels.[22] The Commission has indicated that such pro-competitive policies further the public interest by facilitating the rapid introduction of new services, the lowering of rates, and increases in the quality of service. In contrast, state regulation which has the effect of prohibiting or impeding entry for common carriers generally preclude the introduction

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[20] *First Report and Order, Gen. Docket 80-183, supra* at 1351.

[21] *Id.* at 1338. Although we declined to provide, beyond the forty channels proposed, any of the additional channels requested in Docket 80-183, we did so because of our belief that the additional space requested "could promote inefficient use of the 900 MHz band, which is also in demand by other services." This contrasts sharply with the use of FM subchannels where historic restraints that assured that frequencies would not be used at all or used inefficiently were removed specifically to allow a more efficient use.

[22] *See e.g., Further Notice of Proposed Rulemaking,* Docket 20870, 48 Fed. Reg. 9048 (1983); *Second Report and Order,* Docket 20870, 89 FCC 2d 1199 (1982); *Third Report and Order,* Docket 20870, 48 Fed. Reg. 8074 (1983).

of competition. They favor the existing licensee and, as noted above, provide the existing licensee with the first opportunity to satisfy any unmet need.[23] Such barriers to new entry are in fundamental conflict with our pro-competitive spectrum allocation policies. Therefore, we believe this state regulation of common carriers providing service over subcarriers must also be preempted for this reason.

24. In this connection, we also note that Congress has recently reemphasized the importance of eliminating regulatory obstacles that hinder the development of new and additional uses of the spectrum. The Federal Communications Commission Authorization Act of 1983, Public Law 98-214, adds a new Section 7 to Title I of the Communications Act which states, in pertinent part,

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

This section requires the FCC to encourage the development of new services and provides a presumption that new services are in the public interest. A similar provision was previously included in Senate Bill S. 66, Senate Report No. 98-67. In explaining the objectives of that previous provision, the Senate Report emphasized that "the development of new technologies and the efforts of competitors seeking to respond to consumer demands will bring more service to the public than will administrative regulations." In further elaboration, the Senate Report states that "a claim that the new or additional service will provide competition that will take revenue from another service, either existing or proposed, will not be a valid rebuttal." The regulatory process, the Report states, "should not act as a barrier to those who wish to provide new and additional services."

25. Thus, to the extent that the issues raised herein turn on the implementation of Congressional policy underlying Section 301 of the Communications Act, we believe the Commission's authority must be exercised to eliminate barriers to entry and promote competition. New Section 7 of Title I thus provides strong support for the action we are taking today.

26. Having found authority for preemption in Title III, the only other consideration is whether some other provision of the Act prevents preemption. We recognize and the commenters have noted that Sections

[23] Indeed, we have recognized this problem before but, at that time, did not believe the circumstances warranted preemption. *See First Report and Order, Docket No. 20870,* 69 FCC 2d 398, 401 (1978). We have never, however, focused closely upon the effect of state certification upon spectrum utilization.

2(b) and 221(b) of the Communications Act expressly reserve certain regulatory functions to the states. Section 2(b) provides, in pertinent part, that,

> except as provided in Section 224 and subject to the provisions of Section 301, nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

Section 221(b) provides, in pertinent part, that

> subject to the provisions of Section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . .

These two provisions thus reserve to the states jurisdiction over charges, classifications, practices, services, facilities, or regulations concerning intrastate communication services and telephone exchange service, and historically, most aspects of common carrier paging services have been regulated by the states.[24] We have previously deferred consideration of whether we could preempt entry regulation of these common carrier services.[25] We conclude today that those provisions do not preclude our preemption of state regulation which has the effect of prohibiting or impeding entry of local and intrastate common carrier paging services.[26]

27. Sections 2(b) and 221(b) provide that state regulatory authority must give way to the extent that it conflicts with our authority under Section 301 of the Act.[27] Thus, the states may not engage in activities that

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[24] *See* footnote 6, *supra.* Other than preemption of entry regulation, we intend no change in the existing division of regulatory authority between the Commission and the States.

[25] *See, First Report and Order,* Docket No. 20870, 69 FCC 2d 398, 403 (1978), *recon. denied,* 80 FCC 2d 294, 296 (1980); *Cellular Communications Systems,* 86 FCC 2d 469, 505 (1981), *recon. granted in part,* 89 FCC 2d 59 (1982); *further recon. granted in part,* 90 FCC 2d 571 (1982). *See also Radiocall Corporation,* 92 FCC 2d 160, 163-164 (1982), *aff'd mem. sub nom. Marine Telephone Operator Association v. FCC,* No. 83-1056 (D.C. Cir. 1983).

[26] *See Memorandum Opinion and Order,* Docket 18262, *supra* at 975; *Cellular Communications Systems,* 86 FCC 2d 469, 503-504 (1981); *recon. granted in part,* 89 FCC 2d 59, 96 (1982); *further recon. granted in part,* 90 FCC 2d 571 (1982); *United Telephone Company of Ohio,* 26 FCC 2d 417, 419-420 (1970); *Midwest Corp.,* 53 FCC 2d 294, 303 (1975).

[27] The proviso "subject to Section 301" was added to Section 221(b) in 1954 at the suggestion of this Commission. According to the Commission's comments on the bill amending Sections 2(b) and 221(b), the purpose of the provision was to provide that ". . . this Commission retain jurisdiction over noncommon carrier regulatory aspects of the radio stations involved . . ." The Commission's comments also indicated that Sections 2(b) and 221(b) otherwise provided that the Commission's common carrier jurisdiction did not extend to certain intrastate or local telephone exchange services. *See* H.R. No. 910, 83d Cong., 1st Sess. at 4-5 (1953). Our action today is consistent with this interpretation of those statutory provisions. We are not using our Title II jurisdiction over common

interfere with our authority to license facilities and allocate spectrum under Section 301, so as to frustrate the federal purposes embodied in the Communications Act. *See e.g., National Association of Regulatory Utility Commissioners v. FCC, supra.*[28] As discussed above, we believe state that has the effect of prohibiting or impeding entry of these services conflicts with our spectrum allocation policies, as well as with our licensing authority developed in accordance with Section 301. Accordingly, we believe we may preempt this state regulation to the extent indicated even assuming such regulation is encompassed under Sections 2(b) and 221(b).[29]

28. Additionally, we note that, contrary to Telocator's contentions, Section 331(c)(3) of the Act was not intended to preclude our preemption

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carriers to preempt state entry regulation; rather, the basis for preempting state regulation that has the effect of prohibiting or impeding entry is the conflict between state common carrier regulation and our noncommon carrier licensing policies developed pursuant to Section 301. Because some entities are subject to both our Title II and Title III authority, policies developed pursuant to our radio licensing, or Section 301, authority can affect common carriers. Indeed, that is precisely the situation before us today. In such circumstances, the statute expressly provides, and the legislative history discussed above indicates, that Section 301 affords us jurisdiction.

[28] In dicta, the Court recognized that our Section 301 licensing power was an exception to the restraints of Sections 2(b) and 221(b). It further noted that Section 301 encompassed the power "to draw up comprehensive schemes providing the conditions under which licenses will be granted." In that case, the "comprehensive scheme" was the Commission's pro-competitive policy of creating an atmosphere of free entry and competition which was intended to maximize the development of mobile radio technology. That policy, as well as several others designed to implement Section 301, are the basis of our similar preemptive action today.

[29] The Commission has generally considered the type of service here in question (*i.e., paging service interconnected with the public switched telephone network) to be "telephone exchange service" within the meaning of Section 221(b). See* Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 FCC 2d 830 (1965); FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); and MTS and WATS Market Structure, Phase I, FCC 84-36, 49 Fed. Reg. 7810 (March 2, 1984), at para. 149. *See also United States v. American Telephone and Telegraph Co.*, slip Op. 82-0192 (D.D.C. November 1, 1983), at pp. 4-6. Nevertheless, the evolution of the regulatory treatment of paging is somewhat obscure. At the federal level, paging appears to have been viewed historically as an adjunct or complement to two-way mobile telephone service and therefore deserving of identical regulation. At the state level, on the other hand, paging, because it is a one-way communications service, has not uniformly been treated as a "telephone" service by the state jurisdictions. *See, e.g., Illinois Consolidated Telephone Company v. Illinois Commerce Commission*, 447 N.E. 2d 295 (ILL. 1983), and *Radio Relay Corp. v. Public Utilities Commission*, 341 N.E. 2d 826 (Ohio 1976). *See also* the annual state-by-state survey of RCC regulation in *Telocator*, Vol. 11, No. 3 (March 1984), at pp. 86-88. (Some states regulate paging service provided by telephone companies differently from that provided by RCCs.) Given this regulatory environment, and given the technical and operational differences between traditional common carrier paging and FM subchannel paging, a case can be made that subcarrier paging does not fall within the bounds of Section 221(b).

of state entry regulation. Section 331(c)(3) provides that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, *except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service.*" (Emphasis added). Section 331(c)(3) was enacted to preempt state regulation of private carrier systems. In taking that action, Congress also made clear that Section 331(c)(3) was not a basis for preempting state jurisdiction over common carrier services. The Conference Report accompanying new Section 331 explained that the states were to retain their jurisdiction over common carrier services to the extent that state regulation was "consistent with Sections 2(b) and 221(b)." H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982). Thus, Section 331(c)(3) did not change the balance of regulatory authority but simply deferred to Sections (2)b and 221(b). As we have noted, the states' authority to regulate intrastate services under Sections 2(b) and 221(b) is expressly subject to the provisions of Section 301. Our preemption action, which is based on Section 301, is thus fully consistent with the congressional intent expressed in the Conference Report. Our preemption of state regulation of common carriers that has the effect of prohibiting or impeding entry is not based upon subsection 331(c)(3), but upon the conflict between state entry regulations and our authority under Section 301 of the Act.[30] Accordingly, because it is evident that Section 331(c)(3) was not intended to address our authority under Section 301, we conclude that Telocator's contentions are without merit.[31]

29. *Traffic Load Studies.* Section 22.516 requires traffic load studies to be conducted in conjunction with applications for additional frequencies for an existing radio common carrier paging station. Petitioners requested

[30] We note that the Conference Report also contains a statement by the Committee that ". . . the Commission may not use its licensing powers to circumvent limitations on its economic regulatory jurisdiction over common carrier stations." Report at 56. This statement serves to reinforce our conclusion that the references to Sections 2(b) and 221(b) in Section 331 were not intended to alter the status of state and federal jurisdiction over radio common carriers under existing law. The references were intended merely to clarify that those provisions were unaffected by passage of Section 331. As discussed above, we believe the preemptive action we have taken herein is fully consistent with our authority under those provisions.

[31] There are, of course, matters relevant to the legitimate interests of the states that may become apparent during the entry stage. To the extent that regulation of these matters does not in any way have the effect of prohibiting or impeding entry, this action does not preempt them. For example, it may be necessary that states be notified of the fact that an entity is about to begin operation in order that the state can then exercise its legitimate post entry authority. Additionally, matters such as zoning, health and safety are appropriately regulated so long as the exercise of this authority does not have the effect of prohibiting or impeding entry.

that Section 22.516 be repealed for those existing radio common carriers seeking to lease FM subcarriers for paging services. The parties argue that the economics of leasing agreements and overall marketplace forces would thwart the practice of warehousing spectrum. We find that the costs associated with leasing and warehousing subcarriers would be expected to increase the costs of paging service operations, and would render such warehousing economically unjustifiable, in view of the numerous alternative means of providing paging service. Recent action by the Commission has made available the TV aural baseband for subcarrier operations.[32] Therefore, we conclude that the need for Section 22.516 no longer exists for those radio common carriers seeking to lease FM subcarriers within the market of their existing paging service. In addition, the warehousing of subcarrier channels, however economically unlikely, would not withhold from public use frequencies that have been allocated for the primary purpose of common carrier paging service. Based on the arguments raised by the petitioners and our desire to eliminate unneeded regulation, we are amending Section 22.516 to permit radio common carriers to lease FM subcarriers within the market of their existing service without having to conduct and submit traffic load studies.[33]

30. *Remaining Issues.* On the remaining issues, the Common Carrier Bureau has issued a *Public Notice* indicating that Form 401, Application for Common Carrier paging services, has been modified to take into account the unique aspects of such services offered on FM subcarriers.[34] Thus, the petitions for a revised application form for subcarrier paging are moot. Finally, the Commission stated in the *First Report and Order* that the issue of variable-tuned subcarrier receivers was beyond the scope of this proceeding. Further, the Commission issued a declaratory ruling on the applicability of Section 605 of the Communications Act of 1934, as amended, 47 U.S.C. §605, to the manufacture, sale or lease of tunable FM subcarrier receivers. The ruling stated that "the unauthorized interception and beneficial use of SCA transmissions which are intended for subscribers only would constitute a violation of this statutory provi-

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[32] *Second Report and Order*, the use of subcarrier frequencies in the aural baseband of television transmitter, Docket No. 21323, FCC 84-116, released April 23, 1984.

[33] For a more general review of Section 22.516 see *Fourth Report and Order* in Docket No. 20870 FCC 84-179, adopted April 26, 1984, Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service. This *Order* was preceded by a *Notice of Inquiry and Notice of Proposed Rulemaking*, 61 FCC 2d 266 (1976); *First Report and Order*, 69 FCC 2d 398 (1978) (elimination of prior state certification requirement); *Second Report and Order*, 89 FCC 2d 1199 (1982) (elimination of need showing for one initial two-way channel); *Third Report and Order*, FCC 83-53, 48 Fed. Reg. 8074 (1963) (objective need standards adopted for additional two-way channels).

[34] "FCC will accept FM Subchannel Applications for Common Carrier Services," *Public Notice* No. 1754, January 10, 1984.

sion."[35] None of the *Petitions* point to manifest errors, or omissions within the *First Report and Order* with regard to variable-tuned subcarrier receivers. Additionally, no new evidence was submitted that would have changed the result of the decision. Therefore, the *Petitions for Reconsideration* of these issues are denied.

31. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by the National Association of Broadcasters, National Radio Broadcasters Association the law firm of Fletcher, Heald and Hildreth and Reach, Inc., pertaining to preemption of state statutes regulating entry into paging service on FM subcarriers ARE GRANTED to the extent indicated above. Petitions filed by the National Association of Broadcasters, National Radio Broadcasters Association, the law firm of Fletcher Heald and Hildreth, Reach, Inc., and Telocator Network of America to repeal Section 22.516, traffic load studies, ARE GRANTED to the extent indicated above. The petition by Reach, Inc., to consider variable-tuned FM subcarrier receivers in this proceeding IS DENIED. Finally, petitions to streamline the radio common carrier application form for those seeking to operate paging services on FM subchannels ARE MOOT due to modifications to the form made by the Common Carrier Bureau.

32. Authority for adoption of the rules contained herein is contained in Sections 2, 4 (i), and 303 of the Communication's Act of 1934, as amended.

33. Accordingly, IT IS ORDERED, that Part 22 of the Commission's Rules IS AMENDED as set forth in Appendix A, effective June 8, 1984.

34. Further, IT IS ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

In Section 22.516 paragraph (a) is amended to read as follows:

§22.156 Usage showing for additional channels.

(a) * * *

(1) applications which request an additional frequency for an existing one-way signaling station (except where the additional frequency is made available as a subcarrier on a broadcast station licensed under part 73);

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[35] Letter from Mr. James M. Weitzman (released February 17, 1984).

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations (BC Docket No. 82-536).

I dissent to that part of the majority's decision which preempts state entry regulation of local radio common carrier paging services operating on FM subcarriers.[1] I do not endorse "protectionist" regulatory action either at the state or federal level. However, I dissent because I do not believe the Communications Act permits this Commission to preempt local radio common carrier paging services and because even if the Communications Act permitted such preemption, the record here is inadequate to support the majority's action.[2]

Congress defined the scope of state and federal authority over the telecommunications industry in Sections 2(b)[3] and 221(b)[4] of the Communications Act. These two provisions expressly reserve to the states all regulatory functions for intrastate communications services[5] that have to

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[1] To the extent that this proceeding similarly resolves the preemption issue with respect to TV subchannels and AM broadcasting I likewise dissent. *Memorandum Opinion and Order*, BC Docket No. 82-536, FCC 84-187, released May 2, 1984 (Reconsideration Order), at footnote 6.

[2] In contrast, our legal authority and the record support preemptive action with regard to interstate paging systems, *e.g.*, nationwide or regional services encompassing several states. See Reconsideration Order at para. 20. Such a result is consistent with our recent decision to preempt state regulation of the three 900 MHz nationwide paging systems offered by conventional common carrier mobile services. *See Nationwide Paging Service*, Third Report and Order, Gen. Docket No. 80-183, FCC 84-148, adopted April 11, 1984, released 5/24/84, 97 FCC 2d 900.

[3] 47 U.S.C. Section 152(b) provides, in pertinent part, ". . .subject to the provisions of Section 301, nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . .".

[4] 47 U.S.C. Section 221(b) provides, in pertinent part, ". . .subject to the provisions of Section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . in any case where such matters are subject to regulation by a State commission or by local governmental authority."

[5] It cannot be rationally argued that the type of paging service under discussion here properly is not an intrastate communications service. *See Mobile Tariff Filings*, 53 FCC 2d 579 (1975); *Illinois Bell Telephone Co.*, CC Docket Nos. 78-314 and 315, FCC 83-489, released October 21, 1983.

do with charges, classifications, practices, services, facilities, or regulations.[6] These statutory reservations are subject only to the legitimate exercise of this Commission's Section 301 licensing powers.

Thus, the Communications Act frames the issue before the Commission as: to what extent does the exercise of Section 301 licensing powers override state regulatory authority as delineated in Sections 2(b) and 221(b)? The answer is clear. Section 301 was never intended to establish federal economic regulatory jurisdiction that negates the jurisdiction over local common carrier activities Congress expressly reserved to the states. A contrary interpretation would render the reservations to the states meaningless.[7] Under the majority's expansive interpretation of its Section 301 powers, federal jurisdiction is unlimited, given that virtually every form of intrastate service uses some form of radio service licensed by the FCC.[8] This result is manifestly contrary to congressional intent.

Despite the self-serving reservations to the contrary in the Reconsideration Order at footnote 29, presently and in the past, the Commission has consistently treated common carrier paging services as "telephone exchange service" within the meaning of Section 221(b). *See e.g.*, Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 FCC 2d 830 (1965); FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); and MTS and WATS Market Structure, Phase I, FCC 84-36, 49 Fed. Reg. 7810 (March 2, 1984), at para. 149. The majority admits this fact in footnote 29: "At the federal level, paging appears to have been viewed historically as an adjunct or complement to two-way mobile telephone service and therefore deserving of identical regulation."

Furthermore, such services are provided by divested BOCs under the Modification of Final Judgment [*United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 103 S. Ct. 1240 (1983)] and are specifically defined as "exchange telecommunications services" for that purpose. *United States* v. *American Telephone and Telegraph Co.*, Civ. No. 82-0192 (D.D.C. November 1, 1983), slip op. at 4-6. The statutory language and legislative history confirm the appropriateness of the above determinations, *See e.g.*, 47 U.S.C. Sections 3(n) and 331(c)(3); H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).

[6] While "entry" regulation is not expressly enumerated, state "facilities" regulation encompasses the public convenience and necessity standard determination of "entry" regulation. Likewise, at the federal level, unspecified "entry" regulation is exercised through "facilities" authorizations. *See* 47 U.S.C. Section 214. *See also* 47 U.S.C. Sections 331 (c)(3); H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).

[7] The majority's reliance upon our general Title III and Section 7 regulatory authority (presumed to be encompassed by Section 301 licensing powers) as a basis for preemption is misplaced in light of the explicit constraints upon the exercise of that authority imposed by Section 2(b) and 221(b).

[8] I take no comfort from the majority's assertion that its action is limited to state actions that impede entry. See footnotes 15, 24 and 31 of the majority's opinion. This action is anything but a measured response. Its breadth is indicated in footnote 31 where the majority states that even local zoning, health and safety ordinances which have the effect of prohibiting or impeding entry are preempted.

Commenting (on behalf of this Commission) on a version of the 1954 amendments to Section 221(b) which added the "subject to Section 301" proviso, Chairman Rosel Hyde stated:

> The apparent intent of the proposed amendment to Section 221(b) is to assure that, where radio service is provided as part of telephone exchange service, including mobile as well as point-to-point service, it should be construed as exchange service under the section and hence not subject to the Commission's jurisdiction with respect to charges, classifications, practices, services, facilities, and regulations of common carriers, unless such service is not subject to regulation by State or local authorities.

Regarding the effect of the "subject to Section 301" proviso upon the relative jurisdictions of the FCC and states, Chairman Hyde noted:

> Such a provision which is presently included in Section 2(b)(2) of the act, is desirable in order to avoid any implication that the radio stations to which the section would have reference, would not be subject to the general radio regulatory provisions of title III of the act. The possibility that such radio operations, left unregulated, would cause destructive interference with other interstate radio operations makes essential that this Commission retain jurisdiction over the *noncommon carrier regulatory aspects of the radio stations* involved, and it is believed that the proposed legislation is not intended to restrict such jurisdiction.

H.R. Rep. No. 910, 83d Cong., 1st Sess. at 45 (1953) (emphasis added).

The House and Senate Reports are consistent with Chairman Hyde's understanding of the proviso's effect on the relative jurisdictions of the states and this Commission. For example, the Senate Report (repeating in substance the House Report) states that the purpose of the proviso is to clarify the Commission's common carrier jurisdiction where radio facilities are used by such carriers in lieu of wirelines:

> Questions have been raised, however, with regard to the possibility that such companies might become subject to Federal regulation on account of the use by such companies of radio as a medium instead of wire lines. Under certain circumstances the use of radio is the best engineering solution as, for example, in the case of telephone service to moving vehicles. . .
>
> The legislation is designed to make certain that the *use of radio will not subject to Federal regulation* companies engaged primarily in intrastate operations.

The Senate Report goes on to state:

> The adoption of this amendment is merely a perfecting amendment and would obviate any possible technical argument that the Commission may attempt to assert *common carrier* jurisdiction over point-to-point communication by radio between two points within a single state. . . The commission has not attempted to assert itself under such circumstances in the past. This amendment would crystallize the present regulatory practice. . .

S. Rep No. 1090, 83d Cong., 2d Sess. at 1-2 (1954) (emphasis added).

Furthermore, the recent legislative history of Section 331(c)(3) clearly reaffirms[9] that Sections 2(b) and 221(b) preclude federal preemption of state entry regulation for strictly local services:

> . . . [T]he Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier stations.

H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).[10]

Most damning to the majority's view (and totally ignored in the majority's opinion) is the fact that this Commission has previously ruled that it has no jurisdiction over "entry" regulation of an intrastate mobile radio service pursuant to Section 221(b). Shortly after the enactment of the 1954 amendments to Section 221(b), the Commission stated:

> . . . [I]t is evident that this Commission has no jurisdiction with respect to the charges, classifications, practices, services, facilities, or regulations for, or in connection with, the mobile radio service in issue here, and this Commission's jurisdiction is limited to the jurisdiction flowing from Section 301 and title III of the Communications Act. Thus, while this Commission, in passing upon a grant of radio license in these circumstances, must consider the question of "public interest," it is evident that such "public interest" consideration is *predicated upon the question of whether the local regulatory body has certificated, or franchised, or in any other manner authorized, or permitted, the applicant to engage in the requested communications service.* Where it appears (as it does here) that the local telephone company has been so authorized or empowered, and that showing having been made to us, we are bound to determine that the "public interest" will be served by a grant to a properly qualified applicant. Thus, the *remaining examination of the application is limited to a determination only of the basic qualifications of the applicant and the technical sufficiency of the operation which he proposes.* That is what we have done in this case.
>
> Thus, insofar as the controversy in this case relates to the matter of *competitive impact of one telephone company's operation* upon the other, it is a matter for local regulation and determination. If the State commission were to determine that the complained of competition is undesirable, and were to withdraw its franchise or authorization to either company, *we would be bound to respect that determination and to govern our actions with respect to the radio authorization accordingly.* The only part of the controversy, here presented by Northern, in which we have primary jurisdiction is the question of the legal qualification of Souris to serve the public.

Souris River Telephone Mutual Aid Corp., 28 FCC 275, 280 (1960) (emphasis added).

Even if our statutory authority to preempt were not suspect, the record upon which this preemption is founded is, to put it charitably, meager. It

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[9] The majority concedes that this language was "not intended to alter the status of state and federal jurisdiction over radio common carriers under existing law". Reconsideration Order at footnote 30.

[10] Notwithstanding this most recent declaration of congressional intent, the majority cites, at footnote 28, a less than definitive earlier pronouncement by the court in *dicta* in *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F.2d 630, 173 U.S. App. D.C. 413, 429 (1976) in support of its position.

could scarcely be otherwise when one considers that this issue first arose in petitions for reconsideration — hardly a situation conducive to development of a full record. The record on this issue consists solely of anecdotal affidavits which purport to characterize the states' regulatory policies regarding common carrier paging service. Not a single state regulatory commission participated. In fact, during closing moments of the reconsideration process, the National Association of Regulatory Utility Commissioners (NARUC) raised the question of the adequacy of notice to the states regarding the preemption issue.[11] NARUC requested, but was denied, an opportunity to file comments on this issue.[12]

The law is clear that federal regulation should not be presumed to preempt state regulation without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963), *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1947). Here, congressional design was most certainly to reserve to the states the authority to regulate local paging service. Additionally, we have no record on which to base a claim that state action frustrates congressional intent. Preemption, under these circumstances cannot withstand judicial scrutiny.

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[11] Letter of Paul Rogers, General Counsel, and Genevieve Morelli, Deputy Assistant General Counsel, NARUC, to FCC Chairman Mark S. Fowler, April 13, 1984. In its haste to preempt, the majority does not even acknowledge the letter's existence.

[12] The decision to preempt state entry regulation of local paging on FM subcarriers is not only without adequate record support (even if, *arguendo*, not beyond the FCC's preemptive authority), but also arbitrarily results in two disparate schemes of regulation, *i.e.*, one for paging services offered on FM subcarriers and another for paging services offered on conventional common carrier radio services — dividing regulatory power over a potentially competitive market in an illogical way. *Cf. National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976). The majority acknowledges as much, *see* Reconsideration Order at para. 18, but offers no reasoned justification, contrary to established principles of administrative law. *See e.g., Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971); *Garrett* v. *FCC*, 515 F.2d 1056 (D.C. Cir. 1975); *Telocator Network of America* v. *FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982); *Office of Communications of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

Common Carrier
Customer Premises Equipment
Mobile Services

Commission adopted order providing for removal from regulated service of installed customer premises equipment used in mobile telephone service and owned by American Telephone and Telegraph Company, the independent telephone companies, or the radio common carriers.
—*Telecommunications Equipment*
CC Docket No. 81-893

FCC 84-269

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

SECOND REPORT AND ORDER

Adopted: June 15, 1984; Released: June 29, 1984

BY THE COMMISSION:

I. Introduction

1. In this proceeding we shall resolve issues relating to the detariffing of embedded customer premises equipment (CPE) used in mobile telephone service[1] and owned by the American Telephone and Telegraph

[1] For purposes of this proceeding, mobile CPE includes all customer premises equipment used in connection with services licensed under Part 22 of the Rules of the Commission. These services include public land mobile service (including airborne service), rural radio service, and offshore telecommunications service. Embedded CPE used in mobile telephone service includes all such CPE which was acquired by a carrier or manufactured by an affiliated entity before January 1, 1984. See CC Docket No. 81-893, Further Notice of Proposed Rulemaking, FCC 83-506, 48 Fed. Reg. 54668 (released Nov. 7, 1983) (hereinafter Further Notice) at para. 1. We have noted that common carrier paging receivers "were included in the generic categories of CPE deregulated in the Second Computer Inquiry." Deregulation of Mobile Customer Premises Equipment, CC Docket No. 83-372, Notice of Proposed Rulemaking, FCC 83-141, 48 Fed. Reg. 20952 (released

Company (AT&T), the Independent telephone companies, or radio common carriers (RCCs). We also shall address several points which have been raised by parties regarding our decision detariffing the embedded wireline CPE base owned by AT&T. These points require resolution in advance of our broader reconsideration of that decision. See Part III.C.4, *infra.* Our consideration of embedded CPE used in mobile telephone service represents the continuing application of the principles we developed in *Second Computer Inquiry.*[2] We reached the fundamental conclusion, in that proceeding, that "CPE is a severable commodity from the provision of transmission services and ... regulation of CPE under Title II [of the Communications Act of 1934] is not required and is no longer warranted."[3] As we began to apply the conclusions of *Second Computer Inquiry* to the detariffing of embedded CPE, we noted that "[w]e ... take as our starting point our findings that the CPE marketplace is becoming increasingly competitive, and that continued regulation of CPE is not necessary and in fact could impede the further growth of this competition."[4] As we now apply *Second Computer Inquiry* criteria and objectives to the detariffing of embedded CPE used in mobile telephone service, we must center our analysis on an examination of the extent of competition in this particular segment of the CPE marketplace.

2. For the reasons discussed in the succeeding parts of this Order, we shall require AT&T to remove embedded mobile CPE from regulated service in accordance with conditions and requirements which are identical, in substantial part, to the conditions and requirements we established in *Wireline CPE Detariffing Order.* These conditions and requirements relate to valuation, lease rates and sale prices, price predictability, billing services, maintenance and support, the duration of the transition period,

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April 28, 1983) (hereinafter Mobile CPE Notice) at para. 3 n. 8. We have concluded, however, that, because of apparent uncertainty among some carriers regarding the application of Second Computer Inquiry to paging equipment, we will permit all paging equipment which is acquired between January 1, 1983, and January 1, 1984, to be treated as embedded equipment. CC Docket No. 83-372, Report and Order, FCC 83-507, 48 Fed. Reg. 54619 (released Nov. 7, 1983) (hereinafter Mobile CPE Order) at para. 11. Detariffing rules established in this Order are applicable to embedded paging equipment.

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (Final Decision), *reconsideration,* 84 FCC 2d 50 (1980), *further reconsideration,* 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 103 S. Ct. 2109 (1983).

[3] Final Decision, 77 FCC 2d at 388.

[4] CC Docket No. 81-893, Report and Order, FCC 83-551, 48 Fed. Reg. 57168 (publication of summary) (released Dec. 15, 1983), *reconsideration petitions pending,* Public Notice No. 1445, 49 Fed. Reg. 5672 (released Feb. 6, 1984) (hereinafter Wireline CPE Detariffing Order) at para. 3.

and other similar matters we initially addressed in *Wireline CPE Detariffing Order.* With regard to embedded mobile CPE owned by the Independents and the RCCs, we have concluded that the position held by these companies in this competitive market does not require the imposition of any extended transition period before their embedded mobile CPE is removed from regulated service. We shall require that embedded mobile CPE owned by these companies shall be detariffed as of January 1, 1985. After such date, the Independents and RCCs will be free to establish lease rates and sale prices for this equipment without being subject to any regulatory restrictions. For reasons we will subsequently discuss, we shall extend to the state commissions the flexibility to establish valuation standards to be applied at the time these assets owned by the Independents and RCCs are removed from regulated service.

II. Background

3. In April 1983 we proposed to deregulate mobile CPE, in order to conform our treatment of this CPE with treatment of all other CPE. We also proposed to preempt state regulation of mobile CPE to the same extent we had already preempted state regulation of other CPE. *Mobile CPE Notice*, CC Docket No. 83-372, at para. 3. In a subsequent action in that proceeding we decided that the provision of mobile CPE should be deregulated, that state regulation should be preempted, that conventional mobile CPE should not be treated differently from cellular and wireline CPE, and that the general policies adopted in *Second Computer Inquiry* should apply to mobile CPE. *Mobile CPE Order*, CC Docket No. 83-372, at para. 7. We also decided that "[c]onsistent with the procedures established in the *Second Computer Inquiry*, mobile telephone CPE will be deregulated on a bifurcated basis . . . ." *Id.* at para. 9.

4. In November 1983 we proposed a plan for the detariffing of embedded mobile equipment. We raised issues regarding accounting mechanisms for the provision of embedded mobile CPE on a detariffed basis, asset valuation, the proper role for the states in the detariffing process, and the duration of a transition period for detariffing. *Further Notice* at para. 2. We also proposed that "all embedded mobile CPE should be removed from regulated service not later than December 31, 1987, as we have proposed for [the wireline CPE of] independent telephone companies." *Id.*

5. On December 2, 1983, AT&T filed an emergency petition for reconsideration of *Mobile CPE Order*, CC Docket No. 83-372. AT&T argued that it is not necessary to delay the detariffing of embedded mobile CPE, that competition in the mobile CPE marketplace is sufficient to support immediate detariffing, that the continuation of tariffing after

divestiture of the Bell System[5] would force AT&T to incur unwarranted costs, and that Commission concerns would be fully satisfied by the fact that, if AT&T were permitted to transfer embedded mobile CPE to AT&T Information Systems (AT&T-IS) at the time of divestiture, AT&T would immediately begin applying sale and price predictability requirements established in *Wireline CPE Detariffing Order* to this transferred equipment. On December 22, 1983, we decided to permit the transfer of embedded mobile CPE from AT&T to AT&T-IS as of the date of divestiture, concluding that "permitting AT&T to transfer embedded mobile CPE to [AT&T-IS] . . . will serve the public interest and will not in any way prejudice our further consideration of issues relating to this equipment . . . ."[6]

6. We further concluded that ratepayers and current customers using mobile CPE would not be disadvantaged by the transfer of this equipment to AT&T-IS and that the transfer would not have an adverse effect upon competition in the mobile CPE marketplace, particularly since "our subsequent action in [the CC Docket No. 81-893 rulemaking proceeding] will provide us with an opportunity to fashion a transition to full deregulation of this equipment which ensures that competition will continue to be promoted." *Mobile CPE Reconsideration Order*, CC Docket No. 83-372, at para. 15. We required that the transfer would be made at adjusted net book value, and that AT&T-IS must continue to lease the equipment at rates equivalent to state tariff rates currently in effect, pending further action by the Commission. *Id.* at para. 18.

III. Mobile CPE Owned by AT&T

A. AT&T Proposal

7. AT&T proposes that valuation of AT&T's embedded mobile CPE should be the same as for its other embedded CPE. AT&T Direct Comments at 2. AT&T notes that, in transferring its embedded mobile CPE to AT&T-IS pursuant to *Mobile CPE Reconsideration Order*, CC Docket No. 83-372, it has valued this CPE at net book and has transferred deferred tax reserves and unamortized investment tax credits in the same manner as established by the Commission in *Wireline CPE Detariffing Order*. AT&T argues that no other valuation adjustments are required. *Id.* at 3.

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[5] The Bell Operating Companies (BOCs) were divested from AT&T on January 1, 1984, in accordance with a decision of the United States District Court for the District of Columbia in United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[6] CC Docket No. 83-372, Memorandum Opinion and Order on Reconsideration, FCC 83-598, 49 Fed. Reg. 882 (released Dec. 29, 1983) (hereinafter Mobile CPE Reconsideration Order) at para. 13.

8. AT&T also proposes a sale and price predictability program for embedded mobile CPE which it argues is consistent with the plan we already have approved for AT&T's wireline CPE. *Id.* at 6. A sale and lease option for all existing mobile CPE forms the centerpiece of the plan. The reporting and other procedures established by the Commission for wireline CPE also will apply to embedded mobile CPE. The warranty provisions also would apply under AT&T's proposal. AT&T notes that maximum sale prices for embedded mobile equipment have been implemented as of January 1, 1984. *Id.* The prices for this equipment, in accordance with the standards established in *Wireline CPE Detariffing Order*, have been calculated so that revenues from the sale of all of AT&T-IS's multi-line wireline CPE and mobile CPE do not exceed net book value in the aggregate. *Id.* at 7. The maximum sale prices, under AT&T's proposal, would apply for a two-year period. Nationwide lease rates also would be calculated in accordance with *Wireline CPE Detariffing Order*; these rates would not exceed the higher of (1) an amount equal to 70 percent of the highest state tariff in effect for the equipment involved on March 29, 1983; or (2) the statistical median for all state tariff rates in effect on that date for that piece of equipment. *Id.*

9. AT&T proposes to implement national lease rates for mobile CPE in three stages. First, customers currently paying more than the national lease rate were reduced to the national rate (as of January 1, 1984) and will remain at that level until December 31, 1985. Second, customers paying less than the initial minimum were immediately moved up to the initial minimum. Third, customers thus moved up to the initial minimum, and customers paying more than the initial minimum but less than the national lease rates, would be moved up to the national rate in three six-month stages ending on July 1, 1985. *Id.* at 8.[7] AT&T also proposes that the transition period for embedded mobile CPE should be deemed to have begun on January 1, 1984, because all embedded mobile customers were notified in writing that their CPE would be available for purchase as of that date. *Id.* at 9. AT&T proposes that the first monthly lease rate changes be made on July 1, 1984, and include changes which would have been made if the price predictability plan had gone into effect on January 1, 1984. *Id.* at 9-10.

[7] AT&T notes that there is pending before the Commission a request for clarification from AT&T regarding whether six months is the appropriate interval for lease rate increases under the terms of Wireline CPE Detariffing Order. AT&T Direct Comments at 8 n.25. For a discussion of this issue, see Part III.C.4, *infra.*

B. Comments

10. Most comments in this proceeding[8] have addressed issues relating to mobile CPE owned by Independent telephone companies and the RCCs,[9] and no commenters have objected to the valuation methods proposed by AT&T or to AT&T's proposal that the sale and price predictability plan for embedded mobile CPE should be the same as for AT&T's wireline CPE. One subsidiary question, however, has been presented. ICA argues that several issues have been raised regarding reconsideration of *Wireline CPE Detariffing Order*, relating to the manner in which AT&T-IS is conducting its multi-line CPE sales plan and the manner in which the duration of the transition period should be calculated. ICA Reply Comments at 3-6. ICA contends that any action we take in this proceeding should not alter or otherwise affect the sale and lease plan procedures, and transition requirements, established in *Wireline CPE Detariffing Order. Id.* at 2.

C. Discussion

11. We have concluded that the public interest, convenience, and necessity will best be served by our approval of the AT&T plan for the detariffing of its embedded mobile CPE. There are two primary reasons for this conclusion. First, we have already determined, in *Wireline CPE Detariffing Order*, that the plan proposed by AT&T in that proceeding, as modified by our action, is sufficient to accommodate the interests of ratepayers, investors, and in-place customers. *See, e.g., Wireline CPE Detariffing Order* at paras. 36-37. It follows that application of this plan, as it has been modified, to AT&T's embedded mobile CPE also will serve to achieve the goals we have established throughout our *Second Computer Inquiry* proceedings.

12. Second, the growth of competition in the mobile CPE marketplace will not be impeded by our approval of the AT&T proposal. We already have concluded that "the sale and transfer plan . . . is the most propitious means for fostering the continued growth of competition in the [wireline] CPE marketplace." *Id.* at para. 39. This conclusion applies with equal force to the mobile CPE marketplace. We already have made the findings that "[t]here is ample evidence that strong competition already exists for

[8] In addition to AT&T, direct comments were filed by the People of the State of California and the Public Utilities Commission of the State of California (California), Colton Telephone Company (CTC), Continental Telecom Inc. (Contel), GTE Telephone Companies (GTE), Rochester Telephone Corporation (Rochester), Telocator Network of America (Telocator), United States Telephone Association (USTA), United Telephone System Inc. (United), and the Public Service Commission of Wisconsin (Wisconsin). Reply comments were filed by AT&T, International Communications Association (ICA), Telocator, and USTA. Summaries of these comments are included in the docket of this proceeding.

[9] See Part IV, *infra*.

[mobile telephone] equipment and that AT&T does not command a dominant position regarding sales of this equipment." *Mobile CPE Reconsideration Order*, CC Docket No. 83-372, at para. 15 (footnotes omitted). Given the robust state of competition in the mobile CPE marketplace, there is no need to make more stringent the detariffing requirements we have applied to AT&T in *Wireline CPE Detariffing Order.*

1. Asset Valuation

13. In approving AT&T's proposal to use adjusted net book value[10] as the basis for asset valuation, we specifically conclude that the application of this approach to AT&T's embedded mobile CPE (in the context of the overall rules and procedures we are adopting in this Order) satisfies the requirements of the *Democratic Central Committee* decision.[11] With respect to AT&T's wireline CPE, we concluded that:

> [W]e can fulfill our responsibilities by using net book value as a surrogate for economic value so long as we adopt rules and procedures which provide investors with a fair opportunity to recover their investment and provide ratepayers with a fair opportunity to capture any gains which have accrued in the value of the embedded equipment. We are adopting the necessary rules and procedures . . . and, therefore, the overall sale and transfer plan we have devised permits us to use net book value as a surrogate for economic value.

Wireline CPE Detariffing Order at para. 49. In dealing with AT&T's wireline CPE, we concluded that it was not practical to determine the economic value of the BOCs' embedded base, that net book value would serve as an acceptable surrogate for economic value, and that we have fashioned a detariffing and transfer plan which met the requirements of *Democratic Central Committee* even though the economic value of the transferred assets had not been determined. *Id.* at para. 66. We reached these conclusions because of our findings that "*Democratic Central Committee* stands for the principle that regulators must seek the maximum accommodation of ratepayer and investor interests in connection with the removal of assets from the rate base [and] that there is wide discretion in reaching this accommodation." *Id.*

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[10] Regarding AT&T's wireline CPE, we have permitted the net book value of the embedded assets to be reduced by the amount of deferred tax reserves and unamortized investment tax credits associated with these assets. *See* Wireline CPE Detariffing Order at paras. 143-152 & Appendix A. Our treatment of these tax matters is the subject of reconsideration petitions in that proceeding. *See, e.g.*, Reconsideration Petition of California at 17-20. Our resolution of these tax issues upon reconsideration in that proceeding will have equal application here. In other words, our approval of AT&T's proposal in this Order is subject to actions we may take upon reconsideration in the wireline CPE proceeding.

[11] Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973). For a listing of companion cases, see Wireline CPE Detariffing Order at para. 56 n. 48.

14. The only possible impediment to our application of the valuation procedure adopted in *Wireline CPE Detariffing Order* to the valuation of AT&T's embedded mobile CPE assets would be the contention that we are compelled in this instance, by the dictates of *Democratic Central Committee*, to fix the economic value of these assets through appraisals or some other means because the impracticality of determining the economic value of AT&T's embedded wireline CPE does not extend to this situation. Although no party has raised this contention in this proceeding, we choose to address it here as a means of presenting a further explication of our reading of the *Democratic Central Committee* requirements. We have concluded that use of adjusted net book as the valuation standard for AT&T's embedded mobile CPE is justified on two broad grounds. First, *Democratic Central Committee* does not compel regulators to use net book or any other valuation standard in connection with the removal of assets from regulated service. That case instead requires that gains or losses resulting from such removal be assigned to those who bore the risk of loss while the assets were in regulated service and, more generally, that the interests of ratepayers and investors be equitably accommodated by regulators as part of overseeing the removal of assets.[12] A proper balancing of ratepayer and investor interests does not require any rigid pursuit of economic value as the only standard for valuing assets removed from the rate base. The method of valuation falls within the broad discretion of the regulatory agency, so long as the agency is able to demonstrate that ratepayer and investor interests have been equitably accommodated. We have made that demonstration in *Wireline CPE Detariffing Order*, and we thus are able to apply the detariffing plan adopted in that proceeding to AT&T's embedded mobile equipment.

15. Second, we do not accept the view that the difficulties of appraising AT&T's wireline embedded base are so distinguishable from the circumstances confronting us regarding AT&T's embedded mobile CPE that we are compelled to abandon net book as a proper valuation standard in this instance. We accept AT&T's assertion that, because AT&T has approximately 20,000 embedded mobile units in service in diverse locations throughout the Nation, "it [would be] unnecessarily onerous and costly to conduct on-site appraisals or other forms of valuation." AT&T Direct Comments at 4. We conclude that the public interest is better served by adoption of our detariffing and price

[12] In an earlier assessment of Democratic Central Committee we found that, under that case, "our task . . . is properly to balance the investor and ratepayer interests so as to apportion gains and losses in the most equitable manner." American Tel. & Tel. Co., Charges for Interstate Telephone Service, Docket No. 19129, Phase II, Final Decision, 64 FCC 2d 1, 66 (1977), *quoted in* Wireline CPE Detariffing Order at para. 58.

predictability requirements as a means of effecting the transfer of embedded mobile equipment to AT&T-IS, especially since this approach avoids burdensome appraisal costs.[13]

2. Transition Period

16. AT&T has proposed that the transition period for embedded mobile CPE should be construed as having begun on January 1, 1984. AT&T Direct Comments at 9. The only issue necessary to address, in our view, is whether the transition period should not begin until a date subsequent to our decision in this proceeding.[14] The argument for such an approach would be that in-place customers would be disadvantaged if the transition period were permitted to begin before our final decision and that, in effect, they would be deprived of the protection of a full two-year transition. This argument would have more merit if this Order substantially revamped the plan proposed by AT&T; if that were the case, then it would follow that in-place customers should get the benefit of a full two-year transition beginning after the date of our decision, so that the new ground rules established by this Order would be in place for two years. The Order, however, does not carry out such a reworking of the AT&T proposal. This, of course, is primarily the case because the proposal follows point-by-point the detariffing plan we already have adopted in *Wireline CPE Detariffing Order.* As a result of the action we are taking in this Order it can be said that the detariffing plan adopted in the Order

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[13] A further not inconsiderable factor in concluding that adjusted net book value is an appropriate valuation standard is the fact that, in all likelihood, the economic value of AT&T's embedded mobile equipment is less than the net book value of the equipment. This is largely the case because the advent of cellular telephone service will make obsolete the older forms of mobile telephone technology. *See* AT&T Direct Comments at 4-5 & n.13. To the extent net book exceeds economic value of this equipment, the use of net book benefits AT&T's ratepayers. This ratepayer benefit inherent in the plan we are adopting is balanced by the pricing flexibility and disaggregated pricing rules we are establishing. *See, e.g.,* Wireline CPE Detariffing Order at para. 66. This balancing of interests is at the heart of the regulatory responsibility established in Democratic Central Committee.

[14] No party has raised this issue in comments filed in this proceeding. We choose to examine it here as part of our assessment of whether AT&T's proposed detariffing plan for embedded mobile CPE would serve the public interest, convenience, and necessity. ICA, it should be noted, has argued that AT&T's administration of its plan for wireline CPE is deficient and that we should decide, in our reconsideration of Wireline CPE Detariffing Order, that the transition period for AT&T's wireline CPE should not be treated as having begun on January 1, 1984. ICA argues that our decision here regarding the transition period for AT&T's embedded mobile CPE should not color our consideration of the issues raised by ICA regarding AT&T's wireline CPE. Our conclusions regarding this issue are discussed in para. 17, *infra.*

has essentially been in effect since January 1, 1984.[15] We conclude, therefore, that there is no need to advance the beginning date of the transition because in-place customers are not disadvantaged by treating January 1 as the beginning date.

17. ICA asserts, as a collateral matter, that AT&T-IS has not sufficiently complied with our wireline CPE sale requirements and that any action we take here regarding the triggering of the transition period for embedded mobile equipment should not be construed to prejudice our resolution of the issues ICA has raised regarding wireline CPE. There are two points to be made regarding ICA's assertions. First, ICA apparently does not challenge the adequacy of AT&T-IS's sale procedures regarding embedded mobile CPE and, as we have noted, we see no reason to refuse to accede to AT&T's proposal to treat the transition period for embedded mobile equipment as having begun on January 1, 1984. Second, we wish to make it clear that our conclusion here regarding the triggering of the transition period for embedded mobile CPE in no way prejudices the arguments made by ICA regarding embedded wireline CPE. We will take up the question of whether AT&T-IS has adequately implemented its embedded wireline CPE sale program in connection with our reconsideration of *Wireline CPE Detariffing Order.*

3. Other Detariffing Rules

18. We have noted that, in this proceeding, "we will make any necessary adjustments in the sale program and price predictability period for [embedded mobile] equipment, patterned after the action we have taken in [*Wireline CPE Detariffing Order*]." *Mobile CPE Reconsideration Order*, CC Docket No. 83-372, at para. 18. AT&T has argued that its sale and price predictability plan for embedded mobile CPE has been patterned after the plan we adopted in *Wireline CPE Detariffing Order* and should be approved without any adjustments. *See* AT&T Direct Comments at 6, 10. We have noted our agreement with this assertion. *See* paras. 11 & 16, *supra.* We therefore approve the proposed elements of AT&T's plan for the detariffing of embedded mobile CPE,[16] since we have

[15] The primary difference between the plan we are adopting in this Order and the procedures under which AT&T-IS has been administering the embedded mobile CPE base since January 1, 1984, is the fact that, under our adopted plan, AT&T-IS will implement national lease rates whereas, under the interim procedures, all mobile CPE customers have continued to lease their equipment at existing state tariff rates. On balance, however, we do not view the interim continuation of state tariff rates as working any disadvantage upon in-place customers. To the contrary, we already have concluded that this interim continuation of state tariff rates serves to *protect* in-place customers pending our establishment of a detariffing plan. *See* Mobile CPE Reconsideration Order, CC Docket No. 83-372, at para. 14.

[16] The question of the intervals at which AT&T-IS may adjust multi-line CPE lease rates during the transition period is treated as a separate issue in Part III.C.4, *infra.*

concluded that no adjustments to the plan are necessary to carry out the goals we are pursuing in this proceeding.

4. Lease Rate Adjustments

19. At issue both in this proceeding and in the AT&T embedded wireline CPE proceeding is the question of whether multi-line CPE lease rates may be adjusted by AT&T-IS during the transition period at six-month intervals, or whether these adjustments may occur only at eight-month intervals. AT&T has sought clarification of *Wireline CPE Detariffing Order* with regard to this issue [17] and ICA has made reference to this dispute in its comments in this proceeding. *See* ICA Reply Comments at 5-6. We have decided to address the issue here with respect to both wireline and mobile CPE lease rates. Our addressing wireline CPE in this Order results from our desire to put an end to the uncertainty which has been engendered by the dispute between AT&T and ICA with regard to the lease rate adjustment intervals. We have deemed it advisable to resolve this dispute in this Order because our reconsideration of *Wireline CPE Detariffing Order* remains pending at this time.

20. AT&T contends that, under a fair reading of *Wireline CPE Detariffing Order*, lease adjustments may be made at eight-month intervals for CPE *not* offered for sale at the date of divestiture but that such adjustments may be made at six-month intervals for CPE which *is* offered for sale as of the divestiture date. Culkin Letter at 1. AT&T argues that the Commission established this distinction to give AT&T an incentive to offer embedded CPE for sale on the divestiture date.[18] AT&T suggests that it opted to offer its multi-line base for sale as of January 1 in order to take advantage of this incentive of using six months as the interval for lease rate adjustments. Trantina Letter at 4. AT&T also asserts that use of the eight-month intervals "would extend the price predictability period well beyond two years because AT&T-IS could not, as a practical matter, further increase its lease rates immediately following the increase which occurred in the 24th month." Culkin Letter at 1.

21. ICA argues that AT&T's interpretation of the Commission's decision "is grossly in error" and that AT&T's proposed approach "would . . . phase-in its maximum national lease prices for all CPE product lines a

[17] *See* Letter from D.J. Culkin to Chief, Common Carrier Bureau (Jan. 6, 1984) (hereinafter referred to as Culkin Letter). The Common Carrier Bureau, in response to the Culkin Letter, indicated that clarification would have to await further action by the Commission and that AT&T-IS should advise its multi-line CPE customers that the intervals for lease rate adjustments during the transition were subject to dispute and would be clarified by subsequent Commission action. *See* Letter from Chief, Common Carrier Bureau, to D.J. Culkin (Jan. 17, 1984).

[18] Letter from T. L. Trantina to Chief, Common Carrier Bureau (Mar. 1, 1984) (hereinafter referred to as Trantina Letter) at 4.

full *six months sooner* than the plan approved by the Commission."[19] ICA contends that the Commission's decision clearly intends to apply the eight-month phase-in intervals to all CPE, regardless of when the CPE is first offered for sale by AT&T-IS. ICA asserts that AT&T has not identified any practical problems which would confront AT&T-IS if maximum lease rates are reached in the 24th month rather than the 18th month. ICA Letter at 5.

22. Our intention in *Wireline CPE Detariffing Order* was to establish a two-year transition period for all multi-line CPE and to permit the adjustment of lease rates at eight-month intervals for all this equipment, regardless of the time at which the equipment is first offered for sale. We now reiterate that this rule shall apply to both embedded wireline and mobile CPE. We made the explicit decision "that the transition period for multi-line equipment shall be two years. Contrary to our tentative finding in the *Notice*. . . , we find that the 18-month period of price predictability for multi-line equipment is not adequate." *Wireline CPE Detariffing Order* at para. 93. We went on to specify that "[u]nder AT&T's proposal, the three stages of rate increases would have occurred six months apart. We have decided to retain the three-stage approach, adding two months to each stage." *Id.* at para. 106 n.98. We thus provided that lease rate adjustments could occur at the 8th, 16th, and 24th months of the transition period for each category of equipment. We did not intend any variation of this rule depending upon the point at which a particular category of equipment is offered for sale.

23. AT&T cites language in paragraph 106 of the *Order* as a basis for its conclusion that we intended the eight-month interval to apply *only* to CPE *not* offered for sale at divestiture. It is our view that a closer reading of paragraph 106 indicates that we did not intend any such distinction. We described in paragraph 106 three different situations in which our rules regarding the lease rate ceiling would apply. First, customers paying more than the national lease rate would immediately be moved down to the national lease rate for the full two-year transition period applicable to their CPE. No distinction was made based upon whether the CPE was offered for sale at divestiture. Further, we made it clear that the capped lease rate would be in place for a full two years as a result of our regulatory action, and would not be subject to any adjustment by AT&T-IS after 18 months. Second, customers paying less than the initial minimum would be moved up to the initial minimum at the time of detariffing if AT&T-IS offered their CPE for sale at the time of

[19] Letter from Counsel for ICA to Chief, Common Carrier Bureau (Jan. 13, 1984) (hereinafter referred to as ICA Letter) at 4, 5 (emphasis in original). For a further discussion of this issue, see Letter from Counsel for ICA to Secretary, Federal Communications Commission (Apr. 27, 1984) at 7-8.

divestiture. If AT&T-IS's sale offering was not made until some time after divestiture, then the customers would not be moved up to the initial minimum until the sale offer was made.

24. Third, we provided that:

> [C]ustomers currently paying more than the initial minimum but less than the national lease rate will remain at their current rate level until their category of equipment is initially offered for sale by ATTIS. After this initial sale offering, these customers will be moved up to the national lease rate in three or fewer stages occurring eight months apart during the transition period.

Id. at para 106 (footnote omitted). This third situation covers *all* customers paying more than the initial minimum but less than the national lease rate, regardless of when their equipment is offered for sale. If the initial sale offering is made at divestiture, then the customer becomes subject to the lease rate phase-in process at divestiture. In the context of this characterization of *all* customers, regardless of the date of the initial sale offering of their CPE, we made it clear that the interval of lease rate adjustments would be eight months. As we have noted, this was our intention with respect to all the situations described in paragraph 106.

25. Apart from the clarification we have provided regarding our intent in *Wireline CPE Detariffing Order*, we wish to stress that providing that lease rate adjustments during the transition period may be made at eight-month, rather than six-month, intervals serves the broader policy objectives we have established in this proceeding. We have sought to balance the flexibility given to AT&T-IS in setting lease rates[20] with the adoption of a structure which eases rate shock which otherwise might be experienced by multi-line embedded CPE customers. Extending the transition to two years, and limiting rate adjustments to eight-month intervals, is one means we chose in the *Order* to ease the transition for these customers. At the end of the two-year transition AT&T-IS will be able to set its lease rates based solely on its business discretion and without any regulatory restrictions. We have concluded, however, that regulatory control of lease rates for a full two-year transition, and gradual lease rate adjustments at eight-month intervals, are necessary steps to minimize dislocations among multi-line CPE customers.

IV. Mobile CPE Owned by Independent Telephone Companies and Radio Common Carriers

A. Transfer of Assets to Detariffed Service

1. Comments

26. Although several commenters support our proposal to establish December 31, 1987, as the deadline for the removal of embedded mobile

[20] *See* Wireline CPE Detariffing Order at paras. 107-111.

CPE from tariffed service,[21] there is no consensus regarding this issue. A number of commenters argue that detariffing should be achieved as rapidly as possible.[22] Telocator argues that the factors which led us to establish a transition for AT&T's wireline CPE are not applicable in this setting, and that there is no need for a transitional mechanism in the case of embedded mobile equipment. Telocator Direct Comments at 3. Telocator offers four primary reasons in support of its position. First, there currently is ample competition in the mobile CPE marketplace, and this competition eliminates any need for a transition. *Id.* at 5. Second, embedded mobile CPE customers would not experience any dislocations as a result of immediate detariffing. *Id.* at 6. Third, a gradual transition would burden the Independent companies' general wireline service ratepayers because, asserts Telocator, these ratepayers currently are subsidizing the rates charged by the Independents for mobile CPE. Telocator Reply Comments at 4. Fourth, there are no legitimate interests of the Independent companies which necessitate a gradual transition. Telocator Direct Comments at 7.

2. Discussion

27. We initially proposed that the transition period for both wireline and mobile CPE should be permitted to last until the end of 1987.[23] Implicit in this proposal was the assumption that there were similarities in the markets for wireline and mobile CPE, as well as other similarities regarding the offering of these two types of equipment, which warranted similar detariffing requirements and procedures. Our review of the comments, and our continued examination of the circumstances applicable to the provision of wireline and mobile CPE, has led us to conclude that there are substantial differences in these circumstances. Based upon this conclusion, we have decided to require that state commissions must provide for the removal of embedded mobile CPE from tariffed service not later than December 31, 1984.

28. In deciding upon this earlier date for the removal of embedded mobile CPE assets from regulated service, we have examined a number of factors, including the level of competition in the mobile CPE market, the

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[21] *See* CTC Direct Comments at 4; Contel Direct Comments at 3-4; USTA Direct Comments at 5; Wisconsin Direct Comments at 2. It should be noted that Wisconsin already has acted to detariff embedded mobile CPE.

[22] *See* California Direct Comments at 1; Rochester Direct Comments at 3-4; Telocator Direct Comments at 3. United indicates that it supports the 1987 deadline but that states could be authorized to detariff embedded mobile CPE as soon as possible if United's suggested approach to valuation were to be placed into effect. United Direct Comments at 4.

[23] *See* CC Docket No. 81-893, Notice of Proposed Rulemaking, 94 FCC 2d 76, 109 (1983) (hereinafter Notice); Further Notice at para. 2.

effect of an earlier detariffing deadline on current embedded mobile CPE customers and on ratepayers, and the impact of this shorter transition on the Independent companies' investors. One of the central findings of *Second Computer Inquiry* is that "continued regulation of CPE is not necessary and in fact could impede the further growth of . . . competition."[24] Further, we already have made the finding that strong competition exists regarding the provision of embedded mobile CPE. *See Mobile CPE Reconsideration Order*, CC Docket No. 83-372, at para. 15 & nn. 18-19.[25] We conclude here that this strong competition will not be impeded by an earlier transition deadline and that, in fact, this current level of competition makes it important for us to accelerate the detariffing timetable.

29. A chief reason for our establishment of an extended transition with regard to AT&T-IS in *Wireline CPE Detariffing Order* was our concern that a shorter transition could jeopardize the interests of current embedded CPE customers.[26] We do not find this consideration to be mirrored in the embedded mobile CPE setting. Embedded mobile customers have long had the option to purchase their own mobile CPE, a result of the fact that tariffed lease rates for mobile CPE have been unbundled from transmission services.[27] The advanced state of competition regarding mobile CPE also serves to protect in-place customers from any dislocations resulting from detariffing. In the case of ratepayers, we see no reason to conclude that a longer transition is necessary to protect their interests. We are aware of our responsibilities, under *Democratic Central Committee*, to accommodate ratepayer interests in connection with the removal of assets from regulated service. With respect to mobile CPE, we have satisfied this obligation through the approach we are establishing for the valuation of these assets.[28] Since ratepayer interests will sufficiently be taken into account as a result of the valuation rules we are adopting, the establishment of an extended transition becomes less

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[24] Wireline CPE Detariffing Order at para. 3, *quoted in* Mobile CPE Reconsideration Order, CC Docket No. 83-372, at para. 11.

[25] We also accept Telocator's view that there is strong competition between wireline carriers and RCCs in the primary geographic markets and that non-carrier CPE suppliers further enhance competition. *See* Telocator Direct Comments at 7. Further, we have made the finding that "[r]obust competition is now a reality between RCCs and wireline carriers." Elimination of the Separate Frequency Allocation Structure in the Public Mobile Service (Rules Section 22.501), CC Docket No. 83-1146, Notice of Proposed Rulemaking, FCC 83-477, 48 Fed. Reg. 57572 (released Dec. 12, 1983) at para. 8.

[26] *See, e.g.*, Wireline CPE Detariffing Order at paras. 92-93.

[27] *See* Telocator Direct Comments at 6; Telocator Reply Comments at 4.

[28] See Part IV.C, *infra*.

important as a possible device for serving ratepayer interests.[29]

30. The Independents generally have argued that a gradual transition to detariffing is necessary to ensure that their investors achieve full recovery of their capital investment. *See, e.g.*, Contel Direct Comments at 3-4. We do not agree, however, that we should impose a gradual transition upon the states as a means of guaranteeing full capital recovery. Since early detariffing is beneficial to competition and does not adversely affect the interests of ratepayers or embedded mobile CPE customers, we find that there is no justification for further delaying application of the detariffing principles of *Second Computer Inquiry* to this equipment. As we will indicate in succeeding sections, we are anxious for the state commissions to take an active part in establishing detariffing mechanisms which are tailored to the particular circumstances of the various state jurisdictions. We have concluded that the interests of the Independents' investors can be suitably accommodated within this framework. We find this particularly to be the case because the valuation mechanism we are establishing is a sufficient device for balancing ratepayer and investor interests. In light of this, we have concluded that there simply is no basis for extending the imposition of tariff regulation regarding the offering of embedded mobile CPE.

B. Regulatory Role of the States

1. Comments

31. There is widespread agreement among the commenters that the states should play a role in the detariffing of embedded mobile CPE owned by the Independents and the RCCs whose mobile CPE is subject to state regulation and that the states should be given sufficient flexibility to ensure that detariffing requirements and procedures can be tailored to the various circumstances presented by these carriers.[30] Several commen-

[29] Telocator argues that a gradual transition actually would be detrimental to ratepayers because, according to Telocator, general transmission service ratepayers have borne the burden of subsidizing Independent companies' mobile CPE rates even though these ratepayers generally do not use mobile service. Telocator Reply Comments at 4. It is our view that there is not sufficient information in the present record to enable us to make any finding regarding Telocator's assertions, particularly since the question of whether general ratepayers have been paying such a subsidy must be answered separately in each state jurisdiction based upon the ratemaking practices of the various state commissions. We do note, however, that to the extent such subsidies have existed, early detariffing will put an end to the subsidies and our valuation procedures will further ensure that ratepayers are treated equitably by the detariffing process.

[30] *See* California Direct Comments at 1; CTC Direct Comments at 4; Contel Direct Comments at 3. Rochester is the only commenter arguing that the states should not be given flexibility in establishing detariffing plans. Rochester Direct Comments at 3. USTA argues that it would be inappropriate for this Commission to impose a single detariffing plan, and that this Commission should not preempt the states regarding the

ters suggest that this Commission, in delineating detariffing responsibilities of the states, should retain a supervisory role to ensure that the states comply with general guidelines established by this Commission.[31]

2. Discussion

32. We agree with the general thrust of the comments that it is in the public interest for the state commissions to be given a substantial role in providing mechanisms for the detariffing of embedded mobile CPE. We have proposed such a role for the states with regard to the detariffing of embedded wireline CPE owned by the Independents,[32] and we have concluded that the establishment of such a role for the states also may be desirable here.[33] Our establishment of a uniformly applicable detariffing date[34] is not inconsistent with our endeavoring to rely upon the exercise of state authority with regard to the detariffing process. As we have noted, we established this earlier detariffing date because of our conclusion that such an approach is the best means of implementing the goals of *Second Computer Inquiry*, but the creation of a nationwide detariffing date does not foreclose an active role for the states.

33. The principal advantage of state involvement in the detariffing process for Independents and RCCs is the fact that the state commissions have the capability to take into account the diverse circumstances of the numerous carriers subject to their jurisdiction. We recognize that the detariffing of embedded mobile CPE will have varying impacts upon these carriers because of the wide differences in their size, structure, and operations. The states are well positioned to assess these differences and to take action which is appropriate to the particular circumstances of the various carriers. It is our view that the transition to a fully deregulated mobile CPE market can be made more workable through cooperation between this Commission and the states, and it is a primary goal of this

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establishment of valuation and accounting requirements. USTA Direct Comments at 3, 15.

[31] *See* Contel Direct Comments at 5; USTA Direct Comments at 5; United Direct Comments at 4.

[32] *See* Notice, 94 FCC 2d at 109. Our conclusion here is without prejudice to any action we might take with respect to embedded wireline CPE owned by the Independents.

[33] The principal role to be carried out by the state commissions is the establishment of valuation requirements with regard to the removal of embedded mobile CPE assets from regulated service. See Part IV.C, *infra*. At least one commenter argues that we should require that the states may not impose valuation or other requirements on the carriers and that only mechanisms established by mutual agreement between the states and the carriers are permissible. *See, e.g.*, GTE Direct Comments at 1-2; USTA Direct Comments at 4-5. We do not find such an approach necessary or desirable in this instance. The carriers will have ample opportunity to present their views and proposals to the state commissions, and we are confident that the state commissions will effectively carry out their public interest mandates in establishing valuation and other mechanisms.

[34] See para. 27, *supra*.

Order to foster that cooperation by enabling the states to assume primary responsibility for the establishment of asset valuation requirements and rules. It is also important to point out that our decision in *Wireline CPE Detariffing Order* to establish a single valuation standard applicable to embedded CPE transferred to AT&T-IS was based upon circumstances substantially different from the circumstances we are addressing here. In our prior decision we were considering the valuation of the nationwide CPE holdings of a single entity — the Bell System — and it would have been administratively cumbersome to subject those CPE holdings to numerous different valuation rules and methods derived from "widely varying premises and assumptions." *Wireline CPE Detariffing Order* at para. 48.

34. Some commenters have suggested that this Commission should assert a strong supervisory role to ensure strict adherence by the states to the policy directives established in this Order.[35] We wish to stress, however, that we are not attempting here to establish an intricate and rigid set of rules which will require continuous and extensive monitoring of the states by this Commission. Rather, it is our intention to give the states substantial flexibility with regard to detariffing mechanisms. In doing so, we intend to play only a minimal role in supervising state action. The general parameters guiding state action will be defined in this Order, and the states will have the flexibility to fashion detariffing mechanisms within these parameters. Although we do not foreclose the possibility of our taking action, we do not intend to diminish the role of the states by continuously reviewing their actions regarding the removal of embedded mobile equipment from regulated service.

C. Asset Valuation

1. Comments

35. Most parties commenting on the valuation issue favor the use of net book value or some variant of net book value as the valuation standard.[36] Rochester suggests that net book value should be adjusted by subtracting unamortized tax credits,[37] and Telocator argues that adjusted net book should be applied in the same manner as established by the Commission in *Wireline CPE Detariffing Order*.[38] United asserts that economic value, and not net book, should be used as the valuation standard because the use of economic value would eliminate any controversy regarding past depreciation methods or rates set by the state

[35] *See* Contel Direct Comments at 5; USTA Direct Comments at 5; United Direct Comments at 4.

[36] *See* California Direct Comments at 2; CTC Direct Comments at 3.

[37] Rochester Direct Comments at 2. *See* USTA Direct Comments at 10.

[38] Telocator Direct Comments at 5.

commissions and because use of economic value would ensure that all gains or losses would accrue to the ratepayers.[39]

36. The central debate in the comments regarding asset valuation centers on whether carriers' investors are entitled to receive full recovery of their investment in mobile CPE assets. USTA argues that *Democratic Central Committee* requires full capital recovery and that any rigid application of net book value is not the best means for achieving this recovery. USTA argues that the valuation mechanism should take into account, among other things, the ratemaking practices of the state commissions and particular market conditions. USTA also maintains that *Democratic Central Committee* requires that ratepayers absorb any capital losses upon the removal of assets from regulated service and that, if there is any shortfall, carriers must be permitted to amortize the shortfall above-the-line until the original investment (less salvage) is recovered. USTA Direct Comments at 8-10.

37. Telocator contests USTA's reading of *Democratic Central Committee*, arguing that there is no basis for assuming that ratepayers are responsible for absorbing losses associated with mobile CPE assets. Telocator contends that mobile CPE costs have been charged to general wireline ratepayers and that this practice is improper. According to Telocator, general ratepayers receive only minimal benefits from the offering of mobile services by the carriers, so the ratepayers should not be required to act as guarantors of investments made in demonstrably competitive markets. Telocator Reply Comments at 6-7.

2. Discussion

38. We reiterate at the outset that any effort to establish a valuation mechanism must take into account the *Democratic Central Committee* requirements. We note, however, that we have concluded that the case does not require the use of any particular valuation method but instead stands for the proposition that those who bore the risk of capital losses during the period in which assets are in regulated service are entitled to gains (and must bear the losses) upon the removal of those assets from regulated service.[40] With regard to AT&T, we have concluded that, because of the difficulty and cost of valuing the volume and variety of equipment dispersed throughout the nation, use of net book value is the only practical approach in the case of both wireline CPE[41] and embedded mobile CPE.[42] For other carriers, whose services are concentrated within

[39] United Direct Comments at 3-4.

[40] *See* para. 14, *supra.*

[41] *See* Wireline CPE Detariffing Order at paras. 45-51. For a further discussion of our reasons for imposing a single valuation standard in the case of AT&T, see para. 33, *supra.*

[42] *See* paras. 13-15, *supra.*

smaller geographic areas and who have relatively little CPE, a uniformly applicable valuation rule could well distort the balance required by *Democratic Central Committee.* In other words, if this Commission were to impose net book as the exclusive valuation standard for embedded mobile CPE, then the consequence of such an approach would be a failure to identify any instances in which the economic value of the CPE being transferred to detariffed service either exceeds or falls short of the net book value. With regard to the Bell System's embedded wireline CPE, we concluded that "it is not practical to attempt to determine the economic value of the BOCs' embedded CPE base . . . ." *Wireline CPE Detariffing Order* at para. 66. We therefore found it necessary to use net book value as a surrogate for economic value and to develop a detariffing and transfer plan which, taken as a whole, fairly balances the interests of ratepayers, investors, and the public, thus satisfying the equitable principles of *Democratic Central Committee. See* id. As we address the embedded mobile CPE base owned by the Independents and the RCCs, however, we must recognize that the practical barriers preventing the use of economic value in the case of AT&T may not be evident in the case of Independents and RCCS in many state jurisdictions. We next must recognize that use of economic value as a valuation standard offers a direct and precise means of achieving the balancing of interests required by *Democratic Central Committee* and, therefore, should be utilized to the extent the circumstances which obtain in a particular state jurisdiction make feasible the use of this standard. Finally, we must recognize that there are inherent difficulties in any attempt by this Commission to assess the regulatory history and market conditions in each state jurisdiction in an effort to determine the extent to which economic value is a viable valuation mechanism. Any such effort would demand considerable time and resources and would face the risk of reaching inconclusive findings as a result of the fact that we are a step removed from the regulatory history and market conditions which exist in the various states. Given these circumstances, we have concluded that the establishment of valuation standards for embedded mobile CPE owned by the Independents and RCCs should be the province of the state commissions.

39. USTA's essential argument is that investors have had a reasonable expectation that they would be able to recover their investment in mobile CPE assets, that ratepayers have borne the risk of loss during regulation, and that, therefore, ratepayers must bear any capital losses upon the detariffing of these assets. Telocator's essential argument is that application of *Democratic Central Committee* does not require full capital recovery for investors in this instance because ratepayers have been improperly required to bear losses associated with these assets during regulation.

40. In our view, this dispute regarding capital recovery cannot be resolved without reference to the particular regulatory and market circumstances in each jurisdiction. We have concluded that the state commissions are uniquely situated to undertake this analysis and to establish valuation standards based upon their assessment of these questions. Since differences in market conditions, and in previous rate-making and other regulatory policies, require particularized attention, we have decided that the state commissions must have substantial flexibility in establishing valuation standards. This flexibility also will enable the state commissions to assess and take into account the particular circumstances and concerns of the various carriers subject to their jurisdiction. The state commissions will have discretion to use adjusted net book, net book with no adjustments, economic value (as determined by appraisals or in some other manner), or any other valuation standard.[43]

41. We recognize that net book or adjusted net book may be an appropriate standard for some carriers but that economic value may be appropriate for others. We have concluded that the state commissions are well equipped to develop and apply valuation standards which accommodate differences among the various carriers. For example, if a particular state commission concludes that ratepayers have borne the risk of capital losses associated with mobile CPE during regulation and that economic value is the proper means of measuring any shortfalls which must be absorbed by ratepayers upon detariffing, nothing in this Order restricts the authority of the state commission to require appraisals of the equipment and then to require transfers to unregulated service at the appraised value. Our goal is to maximize the flexibility of the states in dealing with these valuation issues.

D. Accounting

1. Comments

42. There is general agreement among the commenters that the accounting rules for detariffed embedded mobile CPE should be the same as for other embedded CPE. CTC, for example, argues that there is no need for different accounting methods for embedded mobile equipment,[44] and Rochester contends that the establishment of special accounting mechanisms for embedded mobile CPE which are separate from existing deregulated mobile CPE leasing accounts would be unnecessarily burden-

[43] We note that we do not intend our requirement that detariffing be completed by December 31, 1984, to be an impediment to the establishment of valuation standards by the state commissions. In the case of any state commissions which do not complete valuation proceedings by the end of this year, these commissions will have authority to impose valuation requirements in true-up or other proceedings conducted after detariffing.

[44] CTC Direct Comments at 2-3.

some.[45] United claims it already has sufficient procedures in place and any requirement for separate books of account would be unnecessary.[46]

2. Discussion

43. It is our intention to establish accounting arrangements of an interim nature in this Order for embedded mobile CPE. Action which we are planning to take at a later time in this docket and in other proceedings will establish permanent accounting requirements for carriers' unregulated activities and for cost allocations between regulated and unregulated activities. The interim accounting requirements we are establishing for embedded mobile CPE are based upon accounting requirements we already have established for unregulated CPE activities by carriers other than AT&T. Revenues, expenses, inventory, and applicable taxes related to the sale of embedded mobile CPE beginning on January 1, 1985, shall be recorded in accounts in accordance with the provisions of *Uniform System of Accounts*, CC Docket No. 79-105, First Report and Order, 85 FCC 2d 818, 837-38 (1981).[47] Accounting requirements regarding the leasing of embedded mobile CPE after detariffing under this Order shall be the same as those established in *Uniform System of Accounts*, CC Docket 82-681, Report and Order, FCC 83-457, 48 Fed. Reg. 50534 (released Nov. 2, 1983) at para. 67.[48]

44. USTA has argued that we should provide that embedded mobile CPE sold under regulation before detariffing should be covered by our current accounting rules, under which proceeds are treated as gross salvage and credited to the depreciation reserve. USTA Direct Comments at 13. We shall defer resolution of this issue to our subsequent action in this docket relating to embedded wireline CPE owned by the Independents. *See Wireline CPE Detariffing Order* at para. 159 n.131. USTA also asserts that the treatment of gains or losses associated with supporting assets which are removed from regulated service together with embedded mobile CPE should be based upon a determination of whether ratepayers or investors bore the risk of loss during regulation. USTA Direct Comments at 10. We agree with USTA and have concluded

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[45] Rochester Direct Comments at 2.

[46] United Direct Comments at 2.

[47] These provisions specify that, in the case of companies which do not establish separate subsidiaries for the provision of CPE, revenues and expenses must be recorded in account 316, "Miscellaneous income," inventory must be recorded in account 124, "Merchandise and material held for sale," and applicable taxes must be charged to account 327, "Other non-operating taxes."

[48] If embedded mobile CPE is leased by a telephone company, then the company must use account 103, "Miscellaneous physical property," account 315, "Income from miscellaneous physical property," and account 174, "Other deferred credits," in connection with the leasing of such equipment. *See* Uniform System of Accounts, CC Docket No. 82-681, Report and Order, FCC 83-457, 48 Fed. Reg. 50534 (released Nov. 2, 1983) at para. 38.

that the accounting treatment for supporting assets should be determined by the state commissions because of the likelihood that the assignment of risk while these assets are in regulated service varies among the state jurisdictions. In *Wireline CPE Detariffing Order* we preempted the states in establishing our own requirements for the treatment of supporting assets,[49] but in this instance the state commissions will make this determination, taking into account the varying circumstances of the carriers.

E. Removal of Regulatory Controls

45. As we have noted,[50] we have decided that, as of January 1, 1985, carriers other than AT&T will not be subject to any price predictability or sale requirements with regard to their embedded mobile CPE. At that point the regulatory treatment of new and embedded mobile CPE will be the same and we will have achieved the deregulatory goals set out in *Second Computer Inquiry*. In AT&T's case, we have decided to accept AT&T's proposal to include embedded mobile CPE in AT&T-IS's general transition program.[51] In doing so, we have been influenced by the fact that AT&T, while not a dominant player in the mobile CPE market, possesses a substantial market share.[52] In the case of the Independents and the RCCs, however, there is nothing in the record which suggests that the continuation of some form of regulatory control after detariffing would serve the public interest. It has been our goal to free carriers' CPE activities from regulatory restraints,[53] and we have concluded that this step now can be taken for embedded mobile CPE held by the Independents and the RCCs.

V. Regulatory Flexibility Certification

46. We invited interested parties in the *Further Notice* to comment upon our initial regulatory flexibility analysis. *Further Notice* at para. 9. Our analysis concluded that our proposed rules would not duplicate, overlap, or conflict with any existing federal rules, and stated our legal basis for taking action in this proceeding. We also stated the tentative view that our proposed policies would have a favorable impact on entities affected by our action. *Id.* at para. 5. None of the parties filing comments regarding the *Further Notice* addressed any of these issues.

47. We hereby conclude that the actions taken in this Order will have a favorable impact on any small businesses directly affected by these

[49] *See* Wireline CPE Detariffing Order at paras. 153-57.

[50] *See* para. 2, *supra*.

[51] *See* Part III.C.3, *supra*.

[52] AT&T has estimated its share of mobile CPE sales to be 36.2 percent. *See* Mobile CPE Reconsideration Order, CC Docket No. 83-372, at para. 15 n.19.

[53] *See, e.g.*, Wireline CPE Detariffing Order at para. 2.

actions.[54] It is our view that any small Independent telephone companies and RCCs which are considered to be small businesses under the terms of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, will be favorably affected by our actions in this Order because the removal of tariffs and other regulatory restrictions will enable these companies to contend with market forces, to meet the needs of their customers, to take advantage of technological developments affecting mobile CPE, and to control and direct the operations and expansion of their mobile CPE businesses in a more efficient manner.

IV. Ordering Clauses

48. Accordingly, IT IS ORDERED That, pursuant to Sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, and 403, the policies, rules, and requirements set forth in this Report and Order ARE ADOPTED.

49. IT IS FURTHER ORDERED, That the provisions of Part III.C.4, *supra*, relating to the manner in which lease rate adjustments may be made by AT&T-IS under *Wireline CPE Detariffing Order* and under this Order, shall take effect on the date following the date of the adoption of this Order. In compliance with the Administrative Procedure Act, 5 U.S.C. § 553(d), we hereby find good cause for this effective date with respect to Part III.C.4. because of the need to clarify as expeditiously as possible the fact that AT&T-IS is authorized under the terms of *Wireline CPE Detariffing Order* to adjust lease rates for embedded multi-line CPE at eight-month, rather than six-month, intervals during the transition period. Failure to take immediate action regarding this clarification could unduly interfere with the orderly administration of the price predictability program in accordance with the requirements of *Wireline CPE Detariffing Order*.

50. IT IS FURTHER ORDERED, That the Secretary of the Commission shall cause a copy of this Report and Order to be published in the Federal Register.

51. IT IS FURTHER ORDERED, That the Secretary of the Commission shall provide for the delivery of a copy of this Report and Order to each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[54] Manufacturers of mobile CPE and retail or wholesale vendors of mobile CPE are only indirectly affected by the actions we are taking in this Order.

Common Carrier
Customer Premises Equipment

Commission adopted Order authorizing AT&T-Information Systems to carry out lease rate adjustments on July 1, 1984, for embedded multi-line customer premises equipment, and providing that subsequent adjustments for this equipment may be made by AT&T-IS on July 1, 1985, and January 1, 1986.
—*Telecommunications Equipment*
CC Docket No. 81-893

FCC 84-304

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

ORDER

Adopted: June 28, 1984; Released: June 29, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT.

1. In an action taken on June 15, 1984,[1] we indicated that AT&T Information Systems (AT&T-IS) is authorized to adjust lease rates for embedded multi-line customer premises equipment (CPE) at eight-month intervals during a two-year transition period established in an earlier action in this docket.[2] This action constituted a clarification of our intent in *CPE Detariffing Order* that such adjustments could be made at eight-month, rather than six-month, intervals for all embedded multi-line CPE transferred to AT&T-IS. Under our June 15 action, lease rate adjustments

[1] CC Docket No. 81-893, Second Report and Order, FCC No. 84-269 (released June 29, 1984) (hereinafter Second Report and Order).

[2] CC Docket No. 81-893, Report and Order, FCC 83-551, 48 Fed. Reg. 57168 (publication of summary) (released Dec. 15, 1983), *reconsideration petitions pending*, Public Notice No. 1445, 49 Fed. Reg. 5672 (released Feb. 6, 1984) (hereinafter CPE Detariffing Order).

were authorized to be made on September 1, 1984, May 1, 1985, and January 1, 1986.

2. On June 20, 1984, International Communications Association (ICA) petitioned us to order AT&T-IS to cease and desist from carrying out any lease rate adjustments on July 1, 1984.[3] ICA notes in its pleading that AT&T-IS has informed the Commission and in-place customers that it plans to implement lease rate adjustments on July 1. ICA Petition at 4 & n.*. On June 22, 1984, AT&T-IS filed an opposition to the ICA Petition, arguing that the planned July 1 price changes should be permitted to proceed without disruption.[4] Based upon our review of these pleadings, we have decided to deny the ICA Petition. We also shall establish additional requirements regarding the manner in which AT&T-IS may adjust lease rates.

3. With regard to the scheduled July 1, 1984, lease rate adjustments, ICA makes the following assertions. First, *CPE Detariffing Order* is clear on its face that lease rate adjustments may be made at eight-month, and not six-month, intervals and the July 1 changes planned by AT&T-IS are in disregard of this Commission requirement. ICA Petition at 5 ("These increases are being implemented by ATTIS pursuant to its singularly held view that it can implement such increases at 6-month intervals.") Second, AT&T-IS already has carried out an adjustment of lease rates on March 1, 1984, which was unlawful under the terms of *CPE Detariffing Order*,[5] and an additional unlawful increase on July 1 will "compound the damage to users . . ." *Id.* at 6. Third, AT&T-IS is in a position to stop the July 1 increases from taking effect and to notify customers that any July 1 increases for which they actually have been billed are not to be paid. *Id.* at 6-7, 9. ICA also surmises that the Bell Operating Company (BOC) billing systems shared by AT&T-IS, and AT&T-IS's own billing systems, should be configured in a manner which facilitates the prompt removal of the July 1 increases from the billing systems. *Id.* at 7-8.

4. AT&T-IS, in opposing the ICA Petition, argues that "the July 1 increases, as a practical matter, have already been implemented [in many jurisdictions] and cannot be reversed without extraordinary customer

[3] ICA, Petition for Emergency Relief and Order Directing AT&T Information Systems To Cease and Desist from Violation of Commission Orders, CC Docket No. 81-893 (filed June 20, 1984) (hereinafter ICA Petition).

[4] AT&T-IS, Opposition to ICA Petition for Emergency Relief, CC Docket No. 81-893 (filed June 22, 1984) (hereinafter AT&T-IS Opposition).

[5] ICA contends that the March 1, 1984, lease rate adjustments were unlawful because AT&T-IS has not taken sufficient action to trigger the transition period under the terms of CPE Detariffing Order, and the triggering of the transition is a precondition for AT&T-IS's authority to adjust lease rates. This contention will be addressed in a later action in this docket.

confusion, cost and disruption in these jurisdictions." AT&T-IS Opposition at 3. AT&T-IS presents an extensive discussion of the operational constraints of its CPE billing systems as a means of demonstrating that considerable disruption would result from any attempt to forego the scheduled July 1 lease rate adjustments. *See id.* at 12-16. In the course of this discussion, AT&T-IS makes the following assertions. First, as of June 1, 1984, AT&T-IS has converted to its own billing system in 20 jurisdictions; all multi-line CPE bills rendered on or after June 2 in these jurisdictions already reflect a portion of the scheduled July 1 changes. *Id.* at 2. Second, it is not possible to revert to pre-July 1 price levels because "the prior rates have not been retained by [the AT&T-IS billing system] in any manner which would permit AT&T-IS to mechanically input those rates to the system." *Id.* at 13. Any such reversion would require manual input and a reconversion to the old billing software. *Id.* In some jurisdictions this would require reconversion to the old BOC billing codes and rates; AT&T-IS contends this would be extraordinarily difficult because "[the BOCs'] preconversion records have been destroyed." *Id.*

5. Third, any attempt to revert to pre-July 1 price levels would "require AT&T-IS to shut down [its billing systems] completely for at least one month." *Id.* AT&T-IS notes that any such exercise would result in "delays, chaos and financial losses." *Id.* Fourth, in those jurisdictions which have not yet been converted to AT&T-IS billing, any attempt to halt the July 1 changes would generate significant customer confusion and jeopardize the ability of the BOCs to continue efficiently their provision of billing services to AT&T-IS and their conversion of these billing systems to new systems operated exclusively by AT&T-IS. *Id.* at 14-16.

6. ICA filed a reply to the AT&T-IS Opposition on June 26, 1984. ICA renews its contentions regarding the legality of the March 1, 1984, lease rate changes made by AT&T-IS,[6] and further argues that there is no basis for AT&T-IS's conclusion that *CPE Detariffing Order* authorized lease rate adjustments at six-month intervals.[7] On the specific issue of the July 1, 1984, lease changes scheduled by AT&T-IS, ICA argues that AT&T-IS has acted imprudently in scheduling these changes and should be required to absorb any costs associated with its imprudent action. ICA Reply at 6-7. ICA also contends that the Commission should be mindful of the fact that multi-line CPE users are without self-help alternatives because they "cannot on short notice go elsewhere in order to meet their CPE needs." ICA Reply at 8. As a solution to the July 1 billing problem, ICA suggests that AT&T-IS should be required to mail follow-up notices to users indicating that increases reflected on July 1 bills should not be paid. ICA

[6] *See* para. 3 & n.5, *supra.*

[7] As we have noted, we have clarified our intent regarding this issue in the Second Report and Order. *See* para. 1, *supra.*

Reply at 9-10.[8]

7. Based upon our review of these pleadings, we hereby deny the ICA Petition and authorize AT&T-IS to go forward with lease rate adjustments on July 1, 1984. We also shall require that the second lease rate adjustment may be made on July 1, 1985, and the third adjustment may be made on January 1, 1986. Under the terms of CPE Detariffing Order, the second adjustment would have occurred on May 1, 1985, but we now are requiring that this adjustment be postponed until July 1, 1985, to take into account the fact that the July 1, 1984, adjustment is occurring two months earlier than scheduled under CPE Detariffing Order. The January 1, 1986, adjustment adheres to the original schedule established in that Order.

8. Authorizing adjustments to be made on July 1, 1984, rather than September 1, 1984, is based upon the following reasons: (1) Customers will not be irreparably harmed by this authorization because our decision to delay the second adjustment from May 1, 1985 (the originally scheduled date for adjustments under the terms of *CPE Detariffing Order*) to July 1, 1985, provides a means of recoupment for customers in compensation for the fact that the July 1, 1984, adjustments are being made two months in advance of the eight-month interval established in *CPE Detariffing Order*. (2) AT&T-IS, acting on the mistaken assumption that *CPE Detariffing Order* authorized adjustments as of July 1, has already taken a series of steps to effectuate these adjustments. AT&T-IS Opposition at 12; *see* para. 4, *supra*. For example, a considerable number of bills reflecting lease rate adjustments effective July 1 have been mailed to customers. In light of the fact that, by delaying the second scheduled lease rate changes for two months, we have fashioned a remedy for the benefit of in-place customers, we cannot agree with ICA's assertion that requiring AT&T-IS to retract mailed bills and to reprogram its computer software constitutes a workable resolution of this dispute. (3) We recognize that considerable costs would be incurred by AT&T-IS if AT&T-IS were required to attempt to undo the mechanisms already set in motion to carry out adjustments on July 1. In view of these costs and the substantial billing disruption which would occur if the scheduled July 1 lease rate changes were required to be postponed, we conclude that it is desirable to permit these changes to go forward.

9. We must stress, however, that AT&T-IS, in scheduling lease rate changes for July 1, acted solely upon its own interpretation of the requirements of *CPE Detariffing Order* and without any authority under the terms of that *Order*. AT&T-IS in fact was advised by the Common Carrier Bureau in January 1984 "that it would be advisable for ATTIS, in

[8] ICA also discusses additional "long term" remedies to take into account AT&T-IS's "other major violations" of CPE Detariffing Order. ICA Reply at 10-13. As we have noted, these issues are beyond the scope of this Order. See para. 3 n.5, *supra*.

any notice made to its embedded multi-line CPE customers, to inform these customers that there is still uncertainty regarding the . . . phasing-in of multi-line CPE lease rates during the transition, and that these issues will be resolved by the Commission at a later date." Letter from Chief, Common Carrier Bureau, to D. J. Culkin (Jan. 17, 1984); *see* ICA Reply at 6-7. Further, AT&T-IS did not furnish us with any specific notice that it intended to reconfigure its computer billing system in a manner which would preclude rectifying its unwarranted decision to go forward with July 1 lease rate changes. AT&T-IS is admonished for taking these unilateral actions in disregard of the plain meaning of *CPE Detariffing Order*. Such irresponsible action cannot be condoned and AT&T-IS is cautioned to refrain from such action in the future.

10. Accordingly, IT IS ORDERED, That the ICA Petition IS DENIED.

11. IT IS FURTHER ORDERED, That AT&T-IS shall be authorized to make adjustments in lease rates applicable to embedded multi-line CPE, pursuant to the terms of *CPE Detariffing Order* and this Order, on July 1, 1984, July 1, 1985, and January 1, 1986.

12. IT IS FURTHER ORDERED, That this Order shall take effect on the date after the date of the adoption of this Order.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall cause a copy of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CONCURRING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

In re: Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry) CC Docket No. 81-893

I believe that the action taken in this *Order* is correct only insofar as it deals with the immediate problem of implementing a billing system already in place. I object to the admonition gratuitously appended in which AT&T is taken to task for altering its billing system prematurely in the face of the "plain meaning of *C P E Detariffing Order*." (See paragraph 9.)

In fact, the "plain meaning" of the C P E Order became "plain" with the Commission's Interpretation on June 15, just two weeks ago. The Common Carrier Bureau, with uncharacteristic humility, concluded that it was unqualified to make an interpretation when requested by the carrier

to do so early in January. Instead, it recommended an interpretation five months later which the Commission promptly approved. Had the carrier waited for an interpretation before reconfiguring its billing system, it would have been unable to reconfigure in a timely manner even if its interpretation had been sustained.

Much has been said of removing the "heavy hand of government" from the lives of the American people. The tone of this Order appears to supplant that "heavy hand" with the heel of a hobnailed boot.

Employment, Equal Employment Opportunity Rule, Compliance With
License, Renewal of
Petition to Deny

License renewal applications granted. Where licensee's renewal application was held in abeyance beyond expiration of license term in order to monitor its EEO efforts, Commission will consider licensee's overall EEO performance during license term as well as its EEO performance during period of close scrutiny.
—*Walt-West Enterprises Inc.*

FCC 84-296

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In re Applications of	
Walt-West Enterprises, Inc. Station WYEN-FM Des Plaines, Illinois	File Nos. BRH-790327UA BRH-790731UT BRH-820802ZK
WTMJ, Inc. Station WKTI-FM Milwaukee, Wisconsin	File No. BRH-820727I7
WTMJ, Inc. Station WTMJ Milwaukee, Wisconsin	File No. BRH-820727I9
For Renewal of License	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1984 Released; August 16, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (i) a "Petition to Deny and to Intervene" filed November 1, 1982, by the National Black

Media Coalition and others (hereinafter referred to collectively as NBMC)[1] against the above-captioned renewal applications; (ii) opposition pleadings from the licensees; (iii) a reply by NBMC; (iv) an opposition from the American Legal Foundation (ALF); and (v) various related pleadings and correspondence.[2] NBMC alleges generally that none of the challenged stations has complied with the Commission's EEO rule (Sections 73.2080 of the Commission's Rules) with respect to Blacks and other minorities.[3] Accordingly, NBMC requests that the Commission investigate each station's EEO practices, designate each application for hearing, permit the petitioners to intervene,[4] and deny each application.

2. *Procedural Matters.* NBMC supports its claim to standing by submitting the affidavits of residents of the service areas of the above-captioned stations. Since the petition identifies the affiants as members of NBMC or its affiliates, NBMC has established that it is a party in interest.[5] Although two of the affidavits filed by NBMC were untimely submitted, the circumstances surrounding the filings indicate that NBMC

[1] The other parties to the NBMC petition are as follows: Pluria W. Marshall, Chairman of NBMC; Timothy Watley, as a member of NBMC in Milwaukee, Wisconsin; Multicultural Television Council, an affiliate of NBMC in Chicago, Illinois; and Karin English, President of the Multicultural Television Council.

[2] Originally, the petition also challenged the license renewal applications of Station WFYR(FM), Chicago, Illinois (File No. BRH-790801A3) licensed to RKO, General Inc., and WEMP (File No. BR-820802G6) and WMYX(FM) (File No. BPH-820802K2), licensed to Lin-Wisconsin Broadcasting Corporation and WOKY (File No. BR-820729VM) licensed to WOKY Inc., all in Milwaukee, Wisconsin. With respect to Stations WEMP/WMYX(FM) and WOKY, NBMC withdrew its petition, and each station's license was ultimately renewed subsequent to a thorough review of their EEO performance. With respect to Station WFYR(FM), although NBMC also withdrew its petition against it, we will consider the station's EEO performance pursuant to our review of all of RKO's pending renewal applications. *RKO Renewals*, FCC 84-26 released January 25, 1984. In addition, several of the other pleadings filed in this matter are not authorized by the Commission's Rules. Section 1.45 of the Rules specifies that only a petition, an opposition, and a reply may be filed unless the Commission grants permission to file additional pleadings. Thus, all submissions other than those mentioned above were unauthorized and will not be considered except to the extent required by our public interest mandate.

[3] Although the petitioners did not challenge the licensee's employment practices with respect to women, we have examined them and found them to be in compliance with our EEO rule.

[4] Inasmuch as our rules do not provide for consideration of a petition to intervene unless and until an application has been designated for hearing and since none of the challenged applications are being set for hearing by this Order, we shall deny NBMC's request to intervene.

[5] On the other hand, the ALF opposition is not supported by the affidavit of anyone who has demonstrated party in interest status. Accordingly, ALF has not established that it has standing.

did not intend to abuse the processes of the Commission.[6] Therefore, we will accept the late-filed affidavits *nunc pro tunc*, *Malrite of New York*, 71 F.C.C. 2d 241, 242 (1979), and we will consider NBMC's pleading as a petition to deny. *Baltimore Metropolitan Broadcasting Stations* 89 F.C.C. 2d 1183, 1184 (1982).

3. Section 73.2080 of the Commission's Rules requires broadcast licensees to refrain from employment discrimination and to establish and maintain an affirmative action program which results in positive and continuing efforts to recruit, employ and promote qualified women and minorities. In assessing a licensee's compliance, the Commission first compares a station's employment profile to the available labor force. If that comparison reveals a reasonable relationship between the percentages of women and minorities on the station's staff and their presence in the available labor force, the station's EEO program is reviewed for completeness. However, if that comparison reveals that the percentage of women or minorities on the station's staff is less than the applicable processing criteria,[7] or if the employment practices of the station are challenged, the station's EEO program, its Annual Employment Reports and any other relevant and material information concerning its employment practices are analyzed. When the information available indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. However, when that information indicates that any protected group is not being afforded equal opportunities in employment and that the cause is a faulty EEO program or an insufficient effort to implement that program, we order appropriate remedial sanctions. *E.g.*, *Provident Broadcasting Company*, FCC 82-473, 52 R.R. 2d 766 (1982). Further, when the cause of an unreasonably low female or minority presence cannot be determined, we conduct an inquiry or an investigation. Finally, of course, if we find that a substantial and material question of fact exists, we designate the application for an evidentiary hearing. 47 U.S.C. § 309; *Rust Communications Group*, 53

[6] The affidavit submitted by Timothy Watley, who avers that he is a regular listener of the challenged stations in Milwaukee, Wisconsin, was due on November 1, 1982, but was not filed until November 19, 1982. The affidavit submitted by Karin English, a Chicago, Illinois resident, was also due on November 1, 1982, but was not filed until November 4, 1982.

[7] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing criteria for the routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose female or minority employment did not reflect at least 50% of their percentage in the available labor force overall and 25% in the upper-four categories. By Public Notice, FCC 80-61, dated February 13, 1980, 46 R.R. 2d 1693 (1980), these processing guidelines were extended to stations with 5 to 10 full-time employees. Further, the Commission revised the processing guideline for the upper-four job categories to 50% for stations with 11 or more full-time employees.

F.C.C. 2d 355 (1975). Thus, as the foregoing shows and as we have repeatedly stated, the determinative factors in our evaluation of a station's employment practices are not merely the station's employment statistics but the thoroughness of its EEO program and the good faith efforts undertaken to make that program work. *Chicago Metropolitan Stations*, 89 F.C.C. 2d 1031 (1982). With these principles in mind, we shall review the EEO performance of the challenged stations.

4. *WYEN-FM, Des Plaines, Illinois.* By way of background, the Commission previously imposed remedial sanctions on the licensee as a result of a poor minority employment profile and a deficient EEO program during the 1973-1976 and 1976-1979 license terms. With respect to the 1973-1976 term, we granted the licensee a short-term renewal on February 22, 1978, and conditioned that grant upon its submission of a revised EEO program and periodic employment reports. With respect to the 1976-1979 license term, the Commission ordered that the station's 1979 renewal application and supplemental renewal application filed August 2, 1982 be held in abeyance until April 1983, and Walt-West was directed to submit a revised EEO program setting forth goals and timetables for minority hiring for the next year, and two detailed reports.[8] This action was taken because the licensee's submissions revealed: a sustained period of EEO performance outside of acceptable guidelines despite close Commission scrutiny; low numbers of applications received from minorities; and minimal recruitment efforts.

5. Referring to the station's EEO record, NBMC submits that WYEN-FM is one of the worst Commission licensees. In addition, NBMC criticizes the licensee's EEO program because it proposes to contact its referral sources every ninety days rather than contacting them whenever a job opening arises. NBMC also argues that since the EEO program has not produced a single referral, the licensee is merely "going through the motions" of contacting these organizations. Finally, NBMC maintains that the licensee's EEO program is deficient because it does not provide training for minorities.

6. In opposition, Walt West states that it regularly contacts the recruitment sources listed in its EEO program, and it explains that it also periodically contacts these sources in order to compile a list of minority applicants that it can review whenever a job vacancy occurs. As a result of its recruitment efforts, Walt West notes that it hired a Black female in June 1982,[9] and, as of November 1982, another Black applicant was under

[8] *Id* at 1043.

[9] The licensee points out that the Black female hired in June 1982 was not reflected in the pay period covered by the 1982 Annual Employment Report. Moreover, the licensee states that while it employed a Black male as a full-time account executive from 1979 to 1982, his employment was not reflected in either the 1979 or 1982 Annual Employment Reports.

consideration.[10] Further, Walt West points out that as a result of its recruitment efforts it received job applications and inquiries from eleven Blacks during the period of April 20 to October 24, 1982. In light of the above, Walt West concludes that NBMC has not raised any substantial and material question of fact sufficient to designate the renewal application for hearing. In reply, NBMC cites *Rust Communications Group Inc.*, 73 F.C.C. 2d 39 (1979), and it argues that since WYEN's recent EEO performance is made "under the gun" of closer Commission scrutiny, it is tantamount to post-term updating; consequently, the Commission should disregard the station's recent EEO record and designate the application for hearing.

7. According to the "Labor Force Information for Affirmative Action Programs; 1980" published by the State of Illinois, Department of Labor, the Chicago labor force includes 39.1% women and 20.4% minorities.[11] The employment report filed with the licensee's supplemental renewal application shows twenty full-time employees, including one (5.0%) minority, and nineteen persons in the upper-four job categories including the one (5.3%) minority.[12] Similarly, the three other license term employment reports reveal only one minority employee who was employed both full-time and in an upper-level job. *See* Appendix. The licensee's first detailed employment report shows that from April 15, 1980 to April 27, 1982 the station hired twenty persons (seventeen full-time and three part-time), three or (15.0%) of whom were minorities.[13] With regard to its recruitment efforts, the licensee supplied documentation including newspaper advertisements, and it notes that although it contacted four community and minority organizations, none of these sources acknowledged receipt of its letters or referred applicants to the station.[14] As for the twenty positions filled, the licensee states that ten were filled by "walk-ins," two were filled as a result of notices placed on the bulletin boards of Oakton Community College, two by advertisements in the Chicago Tribune, two by contacts with station employees, one from the Columbia Broadcasting College, and

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[10] The second detailed report submitted by Walt West reveals that the Black female was subsequently hired as a traffic director. *See* para. 7, *infra.*

[11] A breakdown of the minority figures indicates that 15.3% of the labor force is Black, 4.1% is Spanish, and 1.0% is other.

[12] The station's part-time staff of six persons included two (33.3%) minorities.

[13] The licensee's minority hires included a Hispanic woman hired on May 27, 1980 as a part-time trainee and promoted to a full-time news announcer, a Filipino woman hired on August 3, 1981 as a full-time secretary, and a Black female also hired as a full-time secretary on February 3, 1982. However, the licensee states that the Filipino woman was "let go" on August 14, 1981 because telephone callers could not understand her "thick accent," and that the Black female was released at the end of her thirty day trial period because "she couldn't handle the typing and answering the telephone."

[14] In addition, the licensee's amended EEO program lists twelve additional minority organizations that it intends to contact in the future.

three through miscellaneous sources. Finally, with respect to future minority hiring goals, Walt West proposed hiring two minorities full-time for jobs in the upper-four categories by April 13, 1983. The station's second detailed report filed April 12, 1983 shows that the station interviewed twenty-one persons, eight of whom were minorities, and it filled eleven positions (ten full-time, one part-time) between April 27, 1982 and March 31, 1983. The station's submissions also reveal that four of the eleven persons hired were minorities and that two minorities were hired for positions in the upper-four job categories.[15] With regard to its recruitment efforts, the licensee notes that for the six sales positions filled it placed advertisements in *La Raza* and *Defender*, the two major minority interest newspapers in Chicago, and also in the local *Tribune* newspaper; and it also sent letters to twenty-five local minority organizations.[16] For the traffic manager position, the station also sent letters to minority organizations, resulting in the employment of a Black female. The local sales manager was attracted through a national publication and the other three announcer positions were filled by reviewing applicant resumes and tapes.

9. During the initial portion of the 1979-1982 license term, it appears that the station made some efforts to seek out minority applicants. As a consequence, the station did hire some minorities, albeit generally for lower level positions. However, since the April 27, 1982 date that WYEN(FM)'s renewal application was held in abeyance, its record of minority hires indicates that it has improved the flow of minority applicants. In this regard, the licensee's 1983 Annual Employment Reports shows that the station's twenty-one full-time employees include three minorities (all of whom are Black), and the twenty upper-four category employees include the three (15.0%) Blacks. In addition, the station's six part-time employees include three minorities, all of whom hold positions in the upper-four job categories.

10. In light of the licensee's overall EEO performance, we believe that NBMC has failed to raise a substantial and material question of intentional discrimination which would warrant a hearing.[17] Further, we disagree with the NBMC argument that we should disregard Walt West's affirmative action efforts during the periods of close Commission scruti-

[15] The minority hires included two Black women hired as full-time salespersons, one on June 14, 1982 and the other on March 1, 1983. A third Black woman was hired on January 31, 1983 as a full-time traffic manager, while a Hispanic woman was hired as a part-time salesperson on February 22, 1983.

[16] The licensee points out that the full-time sales position filled by the Hispanic male was advertised in the *Daily Herald* newspaper.

[17] In this regard, although the licensee's employment profile and practices regarding women were not put into issue by NBMC, we have examined them and we find that they are in compliance with our EEO policies.

ny.[18] Thus, we believe that no further action is warranted at this time, although we caution the licensee that we shall carefully review its 1985 and 1986 Annual Employment Reports for the station to assure ourselves of the licensee's continued compliance. Further, in the event we find that the licensee is not complying with our EEO rule, we intend to take appropriate action.

11. *WTMJ/WKTI-FM*, Milwaukee, Wisconsin. With regard to the stations' employment profile throughout the 1980-1982 license term, NBMC alleges that only one of the forty-seven persons employed in upper-four jobs was Black. In addition, NBMC contends that the minority recruitment sources listed in the licensee's EEO program produced only one minority applicant and that the EEO program failed to include a training program for minorities. Finally, citing *Tri State Broadcasting Co.*, 48 R.R. 2d 813 (1980), NBMC argues that the licensee may not defend the EEO performance of its radio stations by referring to the EEO performance of its co-owned television station.

12. The licensee asserts that NBMC's allegations are unsupported by factual information and that its EEO program fully satisfies the Commission's EEO requirements. In particular, WTMJ Inc. states that the employment of Blacks at stations WTMJ-AM and WKTI-FM is well within the "zone of reasonableness". It points out that in comparison to the Milwaukee labor force which has 12.4% minorities (8.6% of whom are Black), the stations' overall employment of Blacks is above parity (10.8%). While acknowledging that Blacks are not well represented in the upper-four jobs (one of fifty-four or 1.8%), the licensee refers to its affirmative EEO program as mitigation, citing *Bilingual Bicultural Coalition* v. *F.C.C.*, 595 F.2d 621 (D.C. Cir. 1978). Specifically, the licensee points to its list of recruitment sources designed to attract minorities and states that it regularly contacts the Milwaukee Urban League, Milwaukee Spanish Center, American Women in Radio and Television, and the national chapter of the NAACP. In addition, the licensee states that it contacts educational institutions such as the University of Wisconsin at Milwaukee and that it places advertisements in newspapers with significant minority readership such as the *Community Journal* and the *Milwaukee Courier.* Also, it points out the rate of minority hires at both stations during 1981: three of sixteen at WTMJ-AM and one of four at WKTI-FM. Thus, WTMJ Inc. believes that the 20% minority hiring ratio is evidence of an EEO program that is result oriented. In the same vein, the licensee notes that its intern training program with two local universities resulted in the

[18] In our view, holding the license in abeyance was intended as a final opportunity for developing a more effective affirmative action program in an effort to improve recruitment practices and to increase the flow of minority and women applicants. Thus, *Rust* is inapplicable.

promotions of one Black and two Hispanics. WTMJ Inc. further points out that the EEO programs for the AM and FM stations are similar to the EEO program for the jointly operated TV station and that they are administered by WTMJ Inc.'s President. Therefore, it believes that the television station's employment profile is relevant in demonstrating the corporation's good faith as an equal opportunity employer. In this regard, the 1982 Annual Employment Report for Station WTMJ-TV show that of the 122 overall employees, sixteen (13.1%) were minorities, six (10.6%) of whom were Black, while in the upper-four job categories, eleven (10.6%) employees were minorities, eight (7.7%) of whom were Black. According to the licensee, its performance at WTMJ-TV should dispel any inference of non-compliance.

13. In reply, NBMC points out that the AM/FM stations are two minorities short of reaching the Commission's processing criteria for upper-four employment, and it questions the sincerity of the corporation's training efforts.

14. Whether we review the EEO performance of the radio stations separately[19] or in combination with the television station,[20] we are persuaded by the information before us that the licensee does not discriminate and that it has an effective EEO program. Moreover, with regard to NBMC's allegations that WTMJ Inc.'s EEO program produced only one minority applicant, the radio stations' four minority hires reported in the EEO program refute this charge. In addition, we note that the employment report submitted with the licensee's renewal applications reveals that the stations' full-time staff now includes a Hispanic female reporter, which places the licensee's employment of minorities above the Commission's guidelines for overall employment and only slightly below the guidelines in the upper-four job categories. These results, together with an affirmative recruitment program, are convincing. Accordingly, we believe that no further administrative action is necessary.

15. Accordingly, IT IS ORDERED, That the "Petition to Deny and to Intervene" filed by the National Black Media Coalition IS DENIED.

16. IT IS FURTHER ORDERED, That the license renewal applications for Stations WYEN-FM and WTMJ/WKTI ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[19] *See WSM, Inc.*, 66 FCC 2d 994, 1000-01 (1977).

[20] *See Chicago Metropolitan Stations*, supra at 1038-39.

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Memorandum Opinion and Order Granting License Renewal for WYEN-FM, Des Plaines, Illinois and WTMJ/WKTI-FM, Milwaukee, Wisconsin, adopted June 27, 1984

I dissent from the majority's unconditional renewal of WYEN-FM's license. WYEN has a nine year history of non-compliance with our EEO rules despite administrative scrutiny. Only at the eleventh hour, when the station was facing the possibility of an administrative hearing, did it begin to show attention to the FCC's equal employment requirements. To assure that this last minute improvement continues throughout the next license term, the Commission was obliged, at a minimum, to impose an EEO reporting requirement upon WYEN.

When a licensee's efforts to implement and maintain an affirmative action program are continually passive and its minority employment statistics are repeatedly outside the zone of reasonableness, we have a duty to determine whether this condition is a product of licensee inattention or intentional discrimination.[1] Such an issue was raised in this case. In 1978, WYEN's license was renewed for a short term because of WYEN's EEO deficiencies during the 1973-76 license term. In 1982, WYEN's 1979 renewal application and its 1982 supplement to that application (which had not yet been filed) were held in abeyance because of continued deficiencies during the 1976-79 term. During these years (1977-1982), WYEN's minority employment profiles were outside the prevailing zone of reasonableness. In addition, the station made minimal efforts to recruit minorities, received few employment applications from minorities, and experienced quick turnover of those few actually hired.[2] While the Commission could have again renewed WYEN's license for a short term, doing so would have had little practical effect because less than four months remained before WYEN was required to file its next renewal application. Therefore, from April 1982 to April 1983, WYEN was given a last chance before possible designation for a hearing on an EEO issue. Under the gun WYEN finally took concrete affirmative action steps. The station placed advertisements in newspapers of primary interest to minorities, and sent letters requesting referrals to twenty-five local minority organizations. As a consequence, four of the station's eleven hires during this period were minorities.

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[1] *Bilingual Bicultural Coalition* v. *FCC*, 595 F.2d 621, 629-30 (D.C. Cir. 1978) (en banc).

[2] *See Chicago Metropolitan Broadcast Stations*, 89 FCC 2d 1031, 1042-43 (1982).

In view of WYEN's serious, protracted deficiencies the Commission cannot be confident, simply on the basis of this recent turnaround, that WYEN will continue to observe the EEO rules once its license is renewed. The issue is one of risk assessment. WYEN is simply not a good risk. We cannot forget so quickly that WYEN'S poor track record raised serious questions as to whether the station's performance was due to inadvertence, or to intentional discrimination. Our inquiries did not uncover any concrete evidence of intentional discrimination, but it is plain that WYEN did not observe its affirmative action duty until 1982. This fact requires close monitoring of WYEN by the Commission during the next license term.[3]

During the debate on this matter at the Commission's meeting, members of the majority argued that the imposition of reporting conditions in this case would send broadcasters the inappropriate message that compliance brings sanctions. I disagree. This is not the ordinary renewal case, and WYEN is not the typical broadcaster. Our 1982 order did not address WYEN's performance during the period December 1, 1979 to April 1982.[4] That performance was not assessed until now and it does not reveal any substantial efforts to attract minority job applicants. A brief period of improvement, post-term, is an insufficient basis upon which to grant an unconditional renewal.[5] Thus, I believe a far more damaging message is being sent by this decision: a licensee may ignore its equal employment obligations for nine years with near impunity and, by coming into compliance just as the administrative ax is about to fall, can earn the Commission's unquestioning trust. This flies in the face of precedent and sound policy.

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[3] In order to assess WYEN's compliance with our EEO rules the Commission will have to examine not only the station's employment profile during the two week period during which EEO statistics are gathered for the Annual Employment Report, but also the thoroughness of its EEO program, in order to determine whether the station is continuing to make positive efforts to recruit, employ and promote qualified minorities. The majority's response — instructing the staff to give "special scrutiny" to WYEN's Form 395 — is, therefore, wholly inadequate under the circumstances.

[4] *See Chicago Metropolitan Broadcast Stations, supra.*

[5] *Bilingual Bicultural Coalition* v. *FCC*, 595 F.2d at 631.